FILED
SEP 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-263

LIBBEY-OWENS-FORD COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and
UNITED GLASS AND CERAMIC WORKERS
OF NORTH AMERICA, AFL-CIO-CLC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDICES

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTE INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	19
APPENDIX A.	1a
APPENDIX B.	19a
APPENDIX C.	22a
APPENDIX D.	30a
APPENDIX E.	43a
APPENDIX F.	56a
APPENDIX G.	82a

TABLE OF CITATIONS

CASES	PAGE
Bath Iron Works Corp., 154 NLRB 1069 (1965)	14, 16
Brockton-Taunton Gas Co., 132 NLRB 940 (1961)	14
Frank Bros. Co. v. NLRB, 321 U.S. 702 (1944)	15
Kalamazoo Paper Box Corp., 136 NLRB 134 (1963)	12
Libby, McNeill & Libby, 159 NLRB 677 (1966)	14
NLRB v. Jones & Laughlin Steel Corp., 313 U.S. 416 (1947)	13, 15
Pittsburgh Plate Glass Industries, 180 NLRB 477 (1969)	16
Westinghouse Electric Corp., 142 NLRB 317 (1963)	14

STATUTE	
National Labor Relations Act, as amended, 29 U.S.C. §151 et seq. Section 9(b)	13

MISCELLANEOUS	
Abodeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075 (1969)	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Libbey-Owens-Ford Company, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 8, 1974, wherein the Court of Appeals affirmed the decision of the National Labor Relations Board which held Petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the Union on behalf of employees at Petitioner's Brackenridge, Pennsylvania, plant as part of a clarified multiplant unit.

OPINIONS BELOW

The National Labor Relations Board's unit clarification decision and direction of elections in Case No. 6-UC-4, is reported at 169 NLRB 126 (Appendix "A," *infra,* p. 1a). The Board's Supplemental Decision and Order Clarifying Unit is reported at 173 NLRB 1231 (Appendix "B," *infra,* p. 19a). The Board's Decision and Order dismissing the refusal to bargain charge is reported at 189 NLRB 871 (Appendix "C," *infra,* p. 22a). The Decision of the United States Court of Appeals for the Third Circuit remanding the case to the Board is reported at 463 F.2d 31 (Appendix "D," *infra,* p. 30a). The Board's Supplemental Decision and Order reaffirming its underlying unit determination is reported at 202 NLRB No. 15, 82 LRRM 1417 (Appendix "E," *infra,* p. 43a). The Decision of the United States Court of Appeals for the Third Circuit denying Petitioner's Petition for Review to set aside the Board's Order and enforcing the Order is reported at 495 F.2d 1195 (Appendix "F," *infra,* p. 56a). The Third Circuit's denial of Petitioner's Petition for Rehearing was entered on June 13, 1974, and is unreported (Appendix "G," *infra,* p. 82a).

JURISDICTION

The decision of the Court of Appeals was entered on March 8, 1974 (Appendix "F," *infra*, p. 56a). Petitioner's Petition for Rehearing was denied by the Court of Appeals on June 13, 1974 (Appendix "G," *infra*, p. 82a). The jurisdiction of this Court is invoked by virtue of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

After failing in free collective bargaining to achieve its objective of expanding the scope of multi-plant bargaining, the Union filed a unit clarification petition with the National Labor Relations Board (the "Board") requesting the Board to consolidate bargaining units deemed appropriate by the parties for more than twenty years. The Board concluded that the existing separate units and the consolidated multi-plant unit were both presumptively appropriate and directed elections among employees in the two existing single-plant units to determine their unit placement. When the employees voted for inclusion in the multi-plant unit, the Board held that the expanded multi-plant unit was the appropriate unit for future bargaining.

Under these circumstances, the questions presented are:

1. Absent any finding that the existing units have become inappropriate through changed circumstances or that consolidation will improve labor relations, does the Board's decision "clarifying" existing units by consolidating them contravene strong federal policy favoring free collective bargaining and stability of labor

relations, and unreasonably restrict the statutory rights of employees to select freely their bargaining representatives;

2. Whether substantial evidence is lacking in the record considered as a whole to support the Board's determination that the consolidated, multi-plant unit is appropriate; and

3. Whether the Board's unit determination was arbitrary, unreasonable and discriminatory in view of the Board's refusal to clarify existing units by consolidation in virtually indistinguishable cases, and the Board's failure to apply the waiver doctrine in this case even though the Union slept on its rights for more than 20 years.

STATUTE INVOLVED

This case involves the interpretation and application of Section 9(a), (b) and (c)(1) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 *et seq.* (the "Act").

Section 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Section 9(b) of the Act provides:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

Section 9(c)(1) of the Act provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

Libbey-Owens-Ford Company, an Ohio corporation, is engaged in the manufacture and sale of glass and glass products, and operates plants and facilities in several states.

The United Glass and Ceramic Workers of North America, AFL-CIO-CLC, the "Union," was certified by the National Labor Relations Board in 1939 as the bargaining representative in a single bargaining unit consisting of the Company's production and maintenance employees at eight plants located in Ottawa, Illinois, Charleston and Parkersburg, West Virginia, Rossford and Toledo, Ohio, and Shreveport, Louisiana.[1]

The Company opposed the inclusion of the Parkersburg, West Virginia, plant in the Company-wide unit and after certification refused to bargain for this plant. The Union, as in the present proceeding, filed a failure to bargain charge. The Board reversed itself and found the Parkersburg plant constituted a separate unit appropriate for bargaining and dismissed the Complaint.[2]

In October, 1943, the Company acquired the Brackenridge plant, which, prior to its acquisition, had been organized by the Union in 1936. When the Company acquired this plant, it recognized the Union, and thereafter bargained on a single-plant basis. In fact, it was not until more than twenty years later in the multi-plant negotiations in 1965 that the Union first requested that these employees be included in the multi-plant unit. This

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1. *Libbey-Owens-Ford Glass Company*, 10 NLRB 1470 (1939).

2. *Libbey-Owens-Ford Glass Company*, 31 NLRB 243 (1941). In 1958, the Company sold this plant.

request was refused by the Company and dropped by the Union.

The Company's Lathrop, California, plant was under construction when the Union, in October 1961, requested it be included in the multi-plant unit. When this request was denied, the Union dropped its demand and a contract covering the existing multi-plant unit was entered into. Subsequently, after operations commenced at the Lathrop plant, the parties entered into a separate contract covering that plant.

On July 13, 1966, the Union filed a unit clarification petition requesting the Board to combine the existing certified multi-plant unit with the two separate, recognized single-plant units at Brackenridge and Lathrop.

In a three to two decision dated January 12, 1968, the Board concluded that the existing separate-plant units and an expanded multi-plant unit were both appropriate, and that the unit placement of the disputed employees should be determined by a majority vote of the employees in the affected single-plant units;[3] and accordingly directed an election. Board members Fanning and Jenkins dissented, being of the opinion the Board lacked the necessary statutory authority to determine unit placement of represented employees by conducting elections to "clarify" existing bargaining units.

The Company filed suit in the United States District Court for the District of Columbia to enjoin the Board from conducting the elections. The District Court issued the injunction, holding that the Board had acted

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3. *Libbey-Owens-Ford Glass Co.*, 169 NLRB 126 (1968); Appendix "A," *infra*, p. 1a.

in excess of, and contrary to, its statutory authority.[4] The Court of Appeals reversed in a two to one decision for lack of jurisdiction.[5]

During multi-plant negotiations in October 1968, the Union again demanded that the scope of the multi-plant unit be broadened, this time to include the Brackenridge plant, the Lathrop plant and a newly built plant at Mason City, Iowa. The Company steadfastly refused to include Brackenridge or Mason City, but did agree to include Lathrop in the multi-plant unit.

On December 10, 1968, following the directed elections, the Board issued a supplemental decision and order, finding that a majority of the employees in each of the two separate-plant units had voted in favor of merger with the multi-plant unit, and ordered that the multi-plant unit be clarified by including the Brackenridge and Lathrop plants.[6] Members Fanning and Jenkins dissented on the basis of their earlier opinion that the Board lacked statutory authority.

When the Brackenridge contract expired on September 30, 1969, the Company refused to add the Brackenridge plant as a part of the multi-plant unit and refused the Union's demands that the provisions of the multi-plant contract be made applicable to Brackenridge employees. The Union filed unfair labor practice charges alleging a refusal to bargain, and the General Counsel

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4. *Libbey-Owens-Ford Glass Co. v. McCulloch*, 67 LRRM 2712 (D.D.C. 1968).

5. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1016 (1968).

6. *Libbey-Owens-Ford Glass Co.*, 173 NLRB 1231 (1968); Appendix "B," *infra*, p. 19a.

issued a complaint. The Board, members Brown and Kennedy dissenting, dismissed the complaint.[7] Members Fanning and Jenkins based their decision to dismiss on their previously stated view that the Board lacked the necessary statutory authority to determine unit placement of represented employees by conducting elections to clarify existing bargaining units.

Chairman Miller concurred in dismissal not because of any lack of statutory authority, but because "the Board has consistently refused since 1968 to follow and apply the Libbey-Owens-Ford doctrine, even in cases which were virtually indistinguishable,[8] and because the Board's "duty to foster stable collective bargaining relationships is well discharged by leaving the matter of changes in size of a multi-plant bargaining unit to be worked out by agreement of the parties."

On the Union's petition to review and set aside the Board's decision, the Third Circuit held that the Board acted within its statutory authority in conducting a unit clarification proceeding to consolidate existing collective bargaining units, and in ordering elections. After noting that neither members Fanning and Jenkins nor Chairman Miller had passed on the appropriateness of both a multi-plant unit including the Brackenridge plant

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7. *Libbey-Owens-Ford Glass Co.*, 189 NLRB 871 (1971); Appendix "C," *infra*, p. 22a.

8. In a case decided the same day, the Board (members Brown and Kennedy dissenting) dismissed the Union's petition to include the Company's Mason City plant in the multi-plant unit. 189 NLRB 869 (1971). Members Fanning and Jenkins voted to dismiss for the reasons stated in their dissenting opinions in 169 NLRB 126, 129; Chairman Miller for the reasons stated in his concurring opinion in 189 NLRB 871.

and of the Brackenridge single-plant unit, the Court stated:

> "We remand for such a determination unless a majority of the Board adheres to Chairman Miller's view that, under the circumstances of this case, the determination of the unit should be left to collective bargaining or decides not to proceed with the issues presented by the petition for review for other reasons."[9]

On March 1, 1973, the Board, Chairman Miller dissenting, issued its Supplemental Decision and Order[10] in which it reaffirmed its earlier determination that a sufficient community of interest existed between employees in the single-plant units and the multi-plant unit to support a conclusion that the consolidated multi-plant unit would *also* be appropriate, and found that by refusing to bargain with the Union on behalf of the Brackenridge employees as part of the 10-plant unit, the Company violated Section 8(a)(5) and (1) of the Act. Chairman Miller dissented for the reasons stated in his earlier dissent in 189 NLRB 871, that consolidation of clearly appropriate units should be consensual since, in his view, there is no statutory authority for finding a party in violation of the Act when such party is complying with the statutory mandate that it bargain in good faith in *an* appropriate unit, and that there is inequity inherent in limiting the application of this doctrine to the Company by refusing to apply it to other "virtually indistinguishable" cases. The Company's motion for reconsideration was denied by the Board in an order dated May 18, 1972.

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9. *United Glass Workers v. NLRB*, 463 F.2d 31 (3rd Cir. 1972); Appendix "D," *infra*, p. 30a.

10. *Libbey-Owens-Ford Glass Co.*, 202 NLRB No. 15, 82 LRRM 1417 (1973); Appendix "E," *infra*, p. 43a.

On the Company's petition for review and the Board's cross-application for enforcement, the Third Circuit (Circuit Judge Rosenn dissenting) denied the Company's petition, holding that the Board's underlying unit determination was supported by substantial evidence, and was not arbitrary, discriminatory or inconsistent with Board policy applied in other cases.[11] Circuit Judge Rosenn dissented, being of the opinion that different standards of appropriateness should be applied by the Board where, as here, one party seeks to utilize unit clarification proceedings to combine existing appropriate units over the objection of the other party. In his view, the Board erred in treating the determination of appropriateness of the consolidated unit in the same way it would treat the determination in an initial representation election, since no consideration was given to factors militating against consolidation including "the concomitant disruption to pre-existing labor relations which is likely to result." Judge Rosenn also concluded that the Board's decision was arbitrary and unreasonable for the additional reason that the Board has refused to apply the novel unit clarification procedure adopted in this case since its initial decision in 1968.

On June 13, 1974, the Third Circuit denied without opinion the Company's Petition for Rehearing and Suggestion of Rehearing *in banc*.[12]

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11. *Libbey-Owens-Ford Company v. NLRB, et al.*, 495 F.2d 1195 (3rd Cir. 1974); Appendix "F," *infra*, p. 56a.

12. *Libbey-Owens-Ford Company v. NLRB, et al.*, No. 73-1515, June 13, 1974 (unreported); Appendix "G," *infra*, p. 82a.

REASONS FOR GRANTING THE WRIT

The issue here presented is whether the Board can rearrange established bargaining relationships between unions and employers by requiring consolidation of pre-existing bargaining units in the absence of mutual consent and without any finding that the existing units have become inappropriate due to changed circumstances, or that consolidation will improve labor relations. This is an important question which has not been, but should be, decided by this Court, since the Board's unprecedented use of its unit clarification authority to "clarify" existing units by merging them clearly contravenes strong federal labor policy favoring free collective bargaining and stability of labor relations, and restricts the statutory rights of employees to select freely their bargaining representatives.

As Circuit Judge Rosenn stated in his dissenting opinion below at 495 F.2d 1195, 1203:

> "This appeal presents for review one of the most important issues in modern labor relations, the proper determination of the employee unit which is appropriate for collective bargaining between a union and an employer. The problem is compounded and its impact on the stability of labor relations magnified, because the issue raised here concerns altering a plant unit deemed appropriate for bargaining by both union and management since 1943." (Footnote Omitted)

Selection of the appropriate unit for bargaining is fundamental to stable labor relations, the basic policy of the Act. The Board re-emphasized this relationship in *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1963), where it stated:

Reason for Granting the Writ.

> "In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."

Although Congress granted the Board powers under Section 9(b) of the Act to determine appropriate bargaining units, this Court has held that the Board's unit determinations

> "are binding upon reviewing courts if grounded in reasonableness. . . . a proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict."
>
> *NLRB v. Jones & Laughlin Steel Corp.*, 313 U.S. 416, 422-423 (1947).

Use of the unit clarification petition to consolidate pre-existing bargaining units in the absence of changed circumstances rendering the existing units inappropriate obviously erodes the stability of labor relations by inviting unions or employers hoping to improve their bar-

gaining positions by seeking different groupings to upset long established and successful bargaining units.

In the instant case, the Union, after failing to achieve through collective bargaining its objective of expanding the scope of the multi-plant unit, filed a unit clarification petition requesting the Board to combine the existing certified multi-plant unit with its two recognized single-plant units at Brackenridge and Lathrop. The clarification petition did not allege a dispute over job classification, an accretion, or any other change from the previously existing employment pattern, traditional prerequisites to institution of unit clarification proceedings. Cf. *Westinghouse Electric Corp.*, 142 NLRB 317 (1963) (job classification dispute); *Brockton-Taunton Gas Co.*, 132 NLRB 940 (1961) (accretion); *Libby, McNeill & Libby*, 159 NLRB 677 (1966) (change in employment pattern); *Bath Iron Works Corp.*, 154 NLRB 1069 (1965) (Board refused to merge pre-existing units absent changed circumstances).

Not only is there no basis for altering the settled bargaining relationship between the parties on the ground that the existing separate bargaining units have become inappropriate through changed circumstances, but also the Board made no finding that its intervention was justified on the ground that the consolidation would improve labor relations. Instead, the Board adopted a *per se* rule that a consolidated unit is "appropriate" if it would have been appropriate in an initial representation proceeding.

By treating the determination of appropriateness in the present case in the same fashion it treats the determination in the absence of pre-existing bargaining units, the Board improperly ignored serious considera-

tions militating against consolidation. The most important consideration is the destruction of the existing successful bargaining relationships between the parties in favor of some other hypothetically appropriate relationship. Other factors militating against consolidation here are the conceded autonomy of the Brackenridge single-plant unit, the potential disruption of bargaining in the existing multi-plant unit as a result of adding the Brackenridge plant with divergent work force composition, wages and benefits together with a Brackenridge wage committeeman who, by Union constitution, has absolute power to impede or prevent consummation of a multi-plant agreement, and the absence of a determination of whether the existing multi-plant unit employees favor or oppose addition of the Brackenridge employees notwithstanding the probable complication or protraction of negotiations. These factors are clearly relevant to a determination of appropriateness of a consolidated unit composed of pre-existing separate units, and the failure of the Board to consider these factors was a clear abuse of discretion. *NLRB v. Jones & Laughlin Steel Corp., supra.*

The Board's finding of some community of interest between the Brackenridge employees and employees in the multi-plant unit is hardly a sufficient reason for now disturbing the settled and successful bargaining relationship which has existed since 1943. Consistent with the policy of the Act favoring free collective bargaining, this Court in *Frank Bros. Co. v. NLRB,* 321 U.S. 702, 705 (1944), emphasized that once a bargaining relationship has been rightfully established, there should be no external intervention absent "changed situations which might make appropriate changed bargain-

ing relationships." There are no "changed situations" in the instant case, or any other justification for the Board's abrupt departure from its policy of non-intervention as expressed in *Bath Iron Works Corp., supra.*

Nor should the Board be permitted to abdicate its responsibility to determine whether the consolidated unit is "appropriate" by relying on the ostensible desires of the Brackenridge employees as the controlling factor in deciding whether to combine an admittedly appropriate unit with some other unit, over the objection of one of the parties, to achieve a hypothetically appropriate expanded unit. In refusing to conduct a similar election in the unit clarification proceedings in *Pittsburgh Plate Glass Industries,* 180 NLRB 477, 480-481 (1969), the Board stated:

> "Our 'informed discretion'—to use the words of the Supreme Court in the *Packard* case (330 U.S. 485, 491)—tells us that in circumstances such as these the Board should not gamble on stability of bargaining by delegating to employee choice the enlargement of the multi-plant unit."

Chairman Miller, in his dissenting opinion, App. E, *infra,* at pp. 52-53a, urged that, absent any factor justifying alteration of pre-existing bargaining relationships, changes in unit scope should be left to negotiation between the parties:

> "And where, as here, a respondent (whether an employer or a union) is willing to continue good-faith bargaining in an admittedly appropriate pre-existing unit, which has not, by any changed circumstances been rendered inappropriate, I would not find such a respondent guilty of a violation of

> our Act merely because the respondent will not consent to a demand that it abandon that unit and bargain in some other unit instead. In my view, any such combination of clearly appropriate units should be consensual. Nothing should prohibit the parties from voluntarily effectuating such combinations, but, as I interpret the Act, there is no statutory foundation for finding a party in violation of the Act when such party is complying with the statutory mandate, which requires only that it bargain in good faith in *an* appropriate unit."
>
> (Emphasis in Original.)

Furthermore, because consolidation of pre-existing units in the absence of changed circumstances rendering existing units inappropriate restricts the statutory rights of the employees to choose freely their bargaining representatives, consolidation in such circumstances should only be permitted where the Board affirmatively demonstrates compelling reasons for altering existing relationships.

By filing a unit clarification petition, a union seeking to strengthen its position can now combine its pre-existing units thereby virtually foreclosing any possibility of a representation election in which it might lose a separate unit to a rival union. Consequently, as pointed out in Abodeely, *The NLRB and the Unit Clarification Petition,* 117 U. Pa. L. Rev. 1075, 1098 (1969), use of the unit clarification procedure to consolidate admittedly appropriate pre-existing units not only denies employees their full rights to choose their representatives but also unfairly favors the incumbent union over others. In addition to limiting the full expression of employees in the separate Brackenridge single-plant unit,

the Board's decision also limited the freedom of employees in the existing multi-plant unit by denying them any voice in the consolidation, even though the effect of the consolidation is to introduce into the existing multi-plant unit a significant new element of diversity thereby increasing the scope of negotiations as well as the scope of potential dispute.

Absent a determination that consolidation of pre-existing, admittedly appropriate units will improve labor relations, the strong federal policy favoring stability of labor relations and free collective bargaining, and the statutory rights of employees to select freely their bargaining representatives should not be subordinated to the interests of the Union. The failure of the Board in this case to consider and reconcile these conflicting policies and interests in making its determination of the appropriateness of the consolidated unit was an arbitrary and capricious violation of its statutory responsibilities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Dated: September 11, 1974

APPENDIX A

NLRB Decision and Direction of Elections
(Filed: Jan. 12, 1968)

169 NLRB No. 2

D-142
Brackenridge, Pa.
Lathrop, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIBBEY-OWENS-FORD GLASS COMPANY
Employer
and
UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC, and its LOCALS NOS. 1, 5, 9, 19, 33 and 418
Petitioner

Case No. 6-UC-4

DECISION AND DIRECTION OF ELECTIONS

On January 30, 1939, the National Labor Relations Board certified United Glass and Ceramic Workers of North America, AFL-CIO, CLC,[1] as the bargaining representative of the production and maintenance employees[2] of Libbey-Owens-Ford Glass Company at its plants situated in Shreveport, Louisiana; Ottawa, Illi-

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1. 10 NLRB 1470. The Petitioner is herein referred to by its present name, although on the date it was certified it was known as Federation of Flat Glass Workers of America, and, in 1941, its name was changed to Federation of Glass, Ceramic and Silica Sand Workers of America.

2. This certification excluded window-glass cutters who were, and are, represented by the Window Glass Cutters League of America.

nois; Charleston, West Virginia;[3] and Rossford and East Toledo, Ohio.

On July 13, 1966, the Petitioner filed a petition to clarify the certification by including in the above unit the production and maintenance employees at the Company's plants in Lathrop, California, and Brackenridge, Pennsylvania. On September 8 and 9, 1966, a hearing was held before Hearing Officer Herbert Schutzman for the purpose of taking testimony with respect to the issues raised by the petition. All parties appeared and participated at the hearing. On October 18, 1966, the Regional Director for Region 6 issued an order transferring the case to the Board. The Company and the Petitioner thereafter filed briefs with the Board.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

The Company has 10 plants[4] at which it is engaged in the production and fabrication of glass and glass products.[5] Eight of these plants now constitute the

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3. The unit as certified included a plant at Parkersburg, West Virginia, but that plant became a separate unit as a result of the Board's decision of April 23, 1941 (31 NLRB 243), and it was sold in 1958.

4. There are two plants each in Toledo and Rossford, Ohio, and Ottawa, Illinois, and one plant in Shreveport, Louisiana, and Charleston, West Virginia, and in addition the plants at Brackenridge and Lathrop here in issue.

5. The Company owns two other plants, but neither party seeks their inclusion in the multiplant unit, since one is an experimental plant manned solely by technical employees, and the other is a recently acquired subsidiary engaged in the production of plastic and metallic dies, patterns, and molds.

multiplant unit in which the Petitioner was certified,[6] while the other two plants, one at Brackenridge and one at Lathrop, constitute separate bargaining units.[7] As indicated above, the Petitioner now seeks to combine these three separate units into a single Employer-wide unit of all the Employer's glass manufacturing facilities.

The multiplant bargaining history is of long duration, having continued essentially unchanged since at least 1939. Prior to that time the Company had granted voluntary recognition to the Union and had signed collective bargaining agreements covering multiplant units which varied in scope. The Employer acquired the Brackenridge plant in 1943 and recognized the Petitioner as the representative of the employees at that lo-

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6. That unit is described as "All production and maintenance employees who are employed at the Company's Plate, Safety and Thermopane Glass plants located at Toledo, Ohio, Rossford, Ohio and Ottawa, Illinois, and its Window Glass plants located at Charleston, West Virginia and Shreveport, Louisiana, excepting employees in the Window Glass Plants who are in the bargaining unit represented by the Window Glass Cutters League of America and excepting supervisors and clerical employees not directly connected with production."

7. The unit descriptions are:

At *Brackenridge* — "All production and maintenance employees who are employed at the Company's plant located at Brackenridge, Pennsylvania, excepting supervisors, and clerical employees not directly connected with production."

At *Lathrop* — "All hourly-paid production and maintenance workers employed by the Company at its Lathrop, California plant, but not including salaried employees, guards, janitors, office clerical workers, or any supervisory employees with the right to hire, fire, or otherwise discipline employees or effectively recommend such action."

cation, negotiating and signing a number of separate contracts for that unit thereafter. The petition in this case was filed 79 days before the expiration of the then existing Brackenridge contract, and the current contract for that plant was entered into while this proceeding was pending.

In 1962, the Employer built the Lathrop plant, and employees from other plants were afforded an opportunity to work there. All who were selected, whether in layoff status or actively working, went there as new employees, carrying no seniority with them, and all lost their seniority rights at the other plants.[8] In the multiplant negotiations of 1961, the Union requested inclusion of the Lathrop plant in the multiplant unit, but the Company refused, and a multiplant contract was signed which expires October 25, 1968. Eventually the Petitioner was recognized as representative of the employees at the Lathrop plant and the present contract expires June 19, 1969.[9] In 1965, during multiplant negotiations, the Petitioner for the first time sought the inclusion of Brackenridge as well as Lathrop in the multiplant unit, and again the Employer rejected the requested expansion.

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8. Employees who transferred to Lathrop did retain seniority for purposes of certain vested pension rights and, under a later agreement, for vacation and insurance benefits.

9. The contract provides that if Lathrop were added to the multiplant unit, the Lathrop agreement would terminate on October 25, 1968, which is the date for the expiration of the multiplant contract, and that if the Petitioner's demand were not resolved to its satisfaction by June 19,1967, the Petitioner was free to strike on this issue alone.

It is apparent that all the plants involved are engaged in essentially the same basic operations in that all are producing and fabricating glass and/or glass products. Of the eight in the multiplant unit, five produce raw plate glass and fabricate it, while the other three are engaged solely in fabrication. The Brackenridge plant is also engaged in fabrication from raw glass which is obtained both from producing plants within the multiplant unit and from other suppliers. The sole difference between Brackenridge and the other plants is that Brackenridge, in addition to making other products which are typically multiplant operations, is the only plant which fabricates filmed surface glass products and mirrors. The Lathrop plant uses a new and different method of producing glass known as the new float process, and fabricates it into solid safety curved side and back lights for automobiles and cut sizes for the jobbers trade. While there is no basis for concluding that the operations of the various plants are integrated, there is also no basis for finding any greater operational or administrative integration among the eight plants in the multiplant unit than between the Brackenridge and Lathrop plants, individually or collectively, and the other eight plants or any of them.

It is clear from the above facts that separate plant units are presumptively appropriate. It is also apparent that a multiplant unit may be equally appropriate where, as is true of the existing 8-plant unit here, it is agreed to by the parties. Of course, an employer-wide unit is also presumptively appropriate,[10] but the Board has consistently held that separate historical units do

10. See *Owens-Illinois Glass Co.*, 136 NLRB 389, 392.

not automatically merge where the operations are not mutually intended to effect a consolidation thereof.[12] integrated[11] or there is no indication that the parties Not only has the Employer failed to agree to such a merger, it has vigorously opposed it on various grounds.

The Employer contends that both the multiplant unit and the Brackenridge unit include guards as defined in the Act, and it contends that neither of these units may be clarified by the Board because to do so would be in contravention of Section 9(b) of the Act. That section precludes the Board from finding appropriate any unit which includes with other employees any individual employed as a guard.[13] The Union has

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11. *Bath Iron Works Corporation*, 154 NLRB 1069.

12. See *Univac Division, Sperry Rand Corporation*, 158 NLRB 997; *Remington Office Machines, Minneapolis Branch, Division of Sperry Rand Corporation*, 158 NLRB 994. Compare *Chrysler Corporation*, 42 NLRB 1145, in which the parties bargained jointly for and applied the terms of one contract to all plants.

We note that the cases cited by the Company herein are inapposite, some because they involve situations where a union was seeking to add previously unrepresented employees to an existing unit as an accretion thereto and others because they sought clarification of uncertified units at a time when the Board declined to give such relief under a now over-ruled holding. None of those noted by the Employer involved facts like those herein, where a labor organization seeks clarification of a unit in which it was certified by the inclusion of another existing unit or units in which it was the incumbent, recognized representative.

13. We note that the Employer's brief incorrectly states that Section 9(b)(3) of the Act disqualifies a union as the representative of production and maintenance employees if it also represents guards. On the contrary, that section of the Act provides that such a union may not be certified as representative of a guard unit, but permits it to continue to represent other employees.

stated, however, that it seeks clarification of its multiplant unit with the exclusion, *inter alia,* of such categories as the Board, either by statute or by decision, customarily excludes from production and maintenance units. We construe this statement as an acknowledgment by the Union that the guards may not be included in a unit found appropriate by the Board and a request that the Board clarify the unit or units by excluding them.[14] Accordingly, we shall clarify the multiplant unit and the unit of Brackenridge employees by excluding therefrom any individuals who are employed as guards as defined in the Act.

The Company's main contentions are that the proper procedure would have been a representation petition under Section 9(c), which would, however, have been barred by existing contracts, and that the Union has adopted the wrong method. Thus, the Employer argues that in a 9(c) proceeding the Board could determine the inclusions and exclusions of such a unit and arrange an election to provide the employees an opportunity to decide "whether they want union representation and who, if anyone, should represent them" as well as "whether they want to all be included in the same unit or be represented in separate units." It argues that the procedure for clarification of units was never intended to accomplish the combination of existing units but only to resolve questions concerning whether disputed job classifications should be included in or excluded from a unit. It appears that the basic

14. In this connection, we note that in any event the Board may so clarify the existing certified unit on its own motion as part of its authority to police its certifications. *Briggs Manufacturing Company,* 101 NLRB 74, footnote 4, at 76.

reason underlying the Employer's opposition to this procedure is its view that the employees should be permitted to decide whether they want to be included in the same unit or represented in separate units.

We find no merit in the Employer's position that the Union was required to resort to a representation proceeding to resolve the issue. Although it may well be that the Board would reach and determine the unit issue here posed in such representation case, seeking an election that is timely with respect to the existing contract, there is no reason why that is the only route for the resolution of the question. It is certainly not the best route either, where, as in this case, there is no actual question concerning representation because the Employer does not dispute the Union's representative status at any of the plants.

If the overall 10-plant unit sought and the existing single-plant units are all presumptively appropriate, it is not a difficult matter for the Board to make available to the employees in each of the hitherto separately represented plants an opportunity to express their preferences in a secret ballot election between continued representation in their one-plant units, or addition to the multiplant unit. And the current contracts for those separate plants interpose no bar to such separate self-determination elections because the purpose of this proceeding is not to affect existing contracts, but to mark out the appropriate unit for future bargaining. Moreover, the Brackenridge contract was entered into after the institution of these proceedings, and the Lathrop contract expressly provides for adoption of the overall contract's terminal date if Lathrop were added to the multiplant unit, thus revealing the parties' acceptance of

the possibility that Lathrop might be added to the multiplant unit prior to that contract's termination.

We conclude from the above review of outstanding principles and the arguments herein that the Petitioner has adopted a procedure which would appear to encompass its desired relief. We are unable to preceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and only the technical problems of bargaining history and employer opposition have prevented its establishment. The presently existing 8-plant unit encompasses plants which are between 4 and 986 miles from the Employer's home office in Toledo, Ohio, and hence is not based on any geographic considerations, while the Brackenridge and Lathrop plants are 240 and 2,367 miles from Toledo, respectively. As previously set forth, there is generally no greater functional or operational integration between the plants in the multiplant unit than between either of the two disputed plants and the others. Nor, in considering the equities of the positions of the Employer and of the Union, does there appear to be any justification, in the circumstances here, for affording absolute power to either one to compel the other to bargain in the three historical units rather than combining them into one presumptively appropriate employer-wide unit of glass industry plants. Thus the existing multiplant unit is virtually employer-wide, and there is no question that the Petitioner represents the employees at all the 10 plants. In a dispute such as this, it appears to us that the wishes of the disputed employees themselves should be solicited and that some means should be afforded by which they may indicate their

desires. Indeed, such a need is suggested by the Employer's criticism of a possible grant of the Union's request in its argument that a proceeding under 9(c) would give such an opportunity.[15] Further, an outright rejection of this petition would leave the parties with no early source of relief by which the unit issue may be resolved and would serve merely to prolong the labor dispute. Such a result would unquestionably fail to promote the purposes and policies of the Act[16] and would constitute a failure by this Board to fulfill its statutory function to decide in each case the appropriate unit and to afford a peaceful means for doing so.

Contrary to the view of our dissenting colleagues, we are not abrogating our statutory duty to determine the appropriate unit by using this means to ascertain the desires of the employees before finally deciding the appropriate unit or units here. On the contrary, having concluded that either an employer-wide or the separate plant units now existing may be appropriate, we believe it entirely proper to take into consideration the wishes

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15. The Employer's argument is that an election would be proper to determine unit placement of the employees of the two disputed plants only if a rival labor organization were seeking to represent the two plants on some other basis and the employees were given a choice among at least two unions and neither. We see no sound reason to limit our utilization of a self-determination election to such circumstances.

16. Section 1(b) of the Act provides that: "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . ."

of the employees before determining in which unit or units future bargaining shall take place.

In making findings as to appropriate units, the Board reviews all relevant factors. There is nothing in the statute to prevent our giving some weight to employee preference in reaching a final decision. Rather, we view such wishes as one of many relevant facts to be considered. Where, as here, employee desires become relevant, the Board, under its inherent investigatory powers, may take appropriate measures, including the holding of elections, to ascertain what the facts may be. The Board has long given some weight to employee expressions of preference determined through the election procedure, as illustrated by what have come to be known as *Globe* or self-determination elections. Such elections are uniformly conducted among the disputed employees and have received consistent acceptance notwithstanding that nowhere in the statute are they mentioned or specifically authorized, except for the Section 9(b) requirement, adopted in 1947, that the Board utilize its previously existing self-determination election procedure in certain situations involving professional and craft employees. Far from disapproving this use of employee preference as a factor and the means adopted to ascertain it, these requirements indicate Congressional approval thereof.

As is clear from the above discussion, we are persuaded that the Board's authority and practice in determining units and conducting elections, including the weight given to employee wishes as one fact and the holding of self-determination elections as an investigatory, fact-finding tool, are firmly based on the Act. And we are satisfied that our present decision is within our

statutory competency. There will be time enough to treat with the other questions which our dissenting members foresee if they in fact arise. We deal only with the immediate question presented to us, and we do so by using a new combination of long-established procedures, in order to put at rest a controversy that has admittedly been disturbing the relations of the parties for a number of years.

In view of the above, we shall direct that elections be conducted among the employees in the following voting groups:

(1) All production and maintenance employees who are employed at the Company's plant located at Brackenridge, Pennsylvania, excepting clerical employees not directly connected with production, and guards and supervisors as defined in the Act.

(2) All hourly-paid production and maintenance workers employed by the Company at its Lathrop, California, plant, excluding salaried employees, guards, janitors, office clerical workers, and supervisors as defined in the Act.

The question on the ballot shall inquire whether or not the employees now separately represented by the Petitioner wish to be represented by that Union as part of the multiplant unit now consisting of the Employer's glass plants at Toledo and Rossford, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana. If a majority of the valid votes cast in either group are in favor of addition to the multiplant unit, the employees in such group shall have indicated their wish to be part thereof and we find that such an enlarged multiplant unit is appropriate. In the event a majority

of the valid votes cast in either group are against addition to the multiplant unit, the employees in that group shall have indicated their desire to continue to be represented separately, and the Regional Director will issue a certification of results of election to that effect. The election shall be conducted pursuant to National Labor Relations Board Rules and Regulations, Series 8, as amended, to the extent they provide applicable procedures.

ORDER

IT IS HEREBY ORDERED that the certification of representatives issued to the predecessor of United Glass and Ceramic Workers of North America, AFL-CIO, CLC, on January 30, 1939, be, and it hereby is, clarified by excluding therefrom individuals employed as guards within the meaning of the Act.

IT IS HEREBY FURTHER ORDERED that the unit of production and maintenance employees at the Employer's Lathrop, California, plant, represented by the said Union and its Local No. 418, be, and it hereby is, clarified by excluding therefrom individuals employed as guards within the meaning of the Act.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the groups found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 6 shall direct and supervise the elections subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date

below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharge for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[17] Those eligible shall vote whether or not the employees now represented separately by United Glass and Ceramic Workers of North America, AFL-CIO, CLC, Locals Nos. 33 and No. 418, respectively, desire to be represented by the said International and its various Locals as part of the multiplant unit now consisting of the Employer's glass plants at Toledo and Rossford,

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17. Election eligibility lists, containing the names and addresses of all the eligible voters in Voting Groups (1) and (2) must be filed by the Employer with the Regional Director for Region 6 within 7 days after the date of this Decision and Direction of Elections. The Regional Director shall make the lists available to all parties to the elections. No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the elections whenever proper ogjections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana.

Dated, Washington, D. C., Jan. 12, 1968
Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

Member Fanning and Member Jenkins, concurring in part and dissenting in part:

We concur with our colleagues in clarifying the existing multiplant unit to the extent of excluding therefrom individuals employed as guards. Our colleagues, however, are also directing elections aimed solely at merging separate plant units with the multiplant unit. They devise elections whereby employees at two plants in widely separated States — already represented by the petitioning Union in separate plant units — may vote whether they wish to be included in the existing 8-plant unit represented by this same Union.

Although our colleagues readily recognize that no established principles cover this situation, they ignore the fact that the void they undertake to fill — "to mark out the appropriate unit for future bargaining" without affecting existing contracts and, obviously, without reference to a representation issue — is a statutory void.[18] Authorization for this type of elec-

18. Recent Annual Reports of this Board have said: "Incident to its authority to conduct elections, *the Board* has the power to determine the unit of employees appropriate for collective bargaining . . ." (Emphasis supplied.) See *1964, 1965, 1966 Annual Reports, Section V: Representation Cases.*

tion is completely lacking under the Act. Representation is not in issue in this case. Unit scope is.[19]

One cannot quarrel with the majority statement that "it is not a difficult matter" for the Board to make available a secret ballot election tailored to this situation. Mechanically this is quite true. What is difficult is to find in the Act the statutory authority for so doing in these circumstances, and hence for the expenditure of funds for this purpose. There simply is no present statutory authority for permitting employees to decide, in a representational vacuum, which *contract* unit they wish. True, in "Globe," or so-called self-determination elections, the Board has long given weight to employee expression of unit preference *in connection with selection of a bargaining representative.* This is because a question concerning representation exists and Section 9(c) (1) of the Act specifically authorizes an election in those circumstances. The election is held to select a bargaining representative, and only by reason of the selection of a particular representative rather than another representative does the employee register a preference as to unit. As for the 1947 amendments to Section 9(b) which provide for a vote on unit by

19. As the apparent intent is to have the employees concerned decide this question of merger of units — a goal with considerable merit — we have some difficulty understanding why they do not have *all* employees affected express a choice, thus voting the employees in the multiplant unit as well. These employees may not wish to have their 8-plant unit further enlarged, one of the effects of which is to increase the problem of changing their bargaining representative in future years, just as the employees in the single plant units may not wish to be overwhelmed from a voting standpoint by inclusion in a unit of many plants located in four additional States.

professionals, and a vote against separate representation by craft employees in certain circumstances, these provisions are actually limitations imposed by Congress on the Board's authority to define units — limitations within the overall pattern of Section 9 of the Act specifying the circumstances in which elections shall be held. This pattern is further exemplified by the 1947 provision in then Section 9(e) (1), authorizing elections in affected units to determine union-security authorization, and in then Section 9(e) (2), authorizing similar elections for union-security deauthorization. Authority for the former has since been withdrawn by Congress—again within the statutory pattern of specifying what types of election the Board shall hold. These statutory realities are ignored by the majority.

The existence of this void in the statutory scheme is not denied by our colleagues. Instead they speak of the "technical problems of bargaining history and employer opposition" having prevented establishment of a presumptively appropriate employer-wide unit, and perceive no reason for further delay in supplying a solution to the problem, or for leaving the parties with no early source of relief. At best it seems cavalier to treat employer opposition to a request for bargaining on a country-wide, multiplant basis as a mere technical problem. It is a factor to be seriously considered. The mere fact that the Employer and the Union here take opposite positions on the question of enlarging the unit for *future* bargaining does not, to our way of thinking, justify rationalizing the existence of the requisite authority for solution by the employees.

One wonders whether our colleagues have considered what action they would take with respect to

various problems that may arise within the existing statutory framework. Suppose that within the next few months a rival union enters the picture requesting representation in any of these existing units, at an appropriate time with respect to the existing contracts. In view of Section 9(c) (3), which prohibits an election in any bargaining unit or subdivision within which a *valid election* shall have been held in the previous 12-month period, will our colleagues process such petitions, saying that the elections now directed were not "valid" elections within the meaning of 9(c) (3)? Or, will they say these elections were not the sort contemplated by Section 9(c)(1)? But, if the latter, where then in this Act is there so much as a suggestion of authority for elections simply to decide unit questions? Or, suppose that a rival union, armed with a 30 percent showing, appears on the scene now and seeks to participate in the elections here directed? Is it to be denied the right to do so under the Board's contract bar rules, while, at the same time, the bar problem is brushed aside so far as employee determination of unit is concerned?

If Congress wished unit determinations to be made through Board processes when the context is one of threatened strikes and no question of representation exists, it can easily so provide. It can also easily provide that such non-representational determinations may be settled at any time through Board-directed elections. But it has not so far done this, and as matters stand, the merger of units is left to voluntary bargaining by the parties unless the choice of a bargaining representative is in issue.

Accordingly, we dissent from the majority opinion insofar as it directs elections in this unit clarification proceeding.

Dated, Washington, D.C., Jan. 12, 1968.

JOHN H. FANNING
Member

HOWARD JENKINS, JR.
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX B

Board's Supplemental Decision and Order Clarifying Unit

(Filed Dec. 10, 1968)

173 NLRB No. 187

D-1602
Brackenridge, Pa.
Lathrop, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIBBY-OWENS-FORD GLASS COMPANY Employer and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC, and its LOCALS NOS. 1, 5, 9, 19, 33, and 418 Petitioner	Case 6-UC-4

SUPPLEMENTAL DECISION AND ORDER
CLARIFYING UNIT

Pursuant to a Decision and Direction of Elections issued by the National Labor Relations Board on Jan-

uary 12, 1968,[1] an election by secret ballot was conducted on March 20, 1968, under the direction and supervision of the Regional Director for Region 6, among the employees in two voting groups, respectively located at the Employer's Brackenridge, Pennsylvania, and Lathrop, California, plants. The question on the ballot was whether or not these employees, now separately represented by the Petitioner, wish to be represented by that Union as part of the multiplant unit now consisting of the Employer's glass plants at Rossford and Toledo, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana. After the elections, the parties were furnished with tallies of ballots. In the Lathrop, California, voting group, of approximately 691 eligible voters, 579 ballots were cast, of which 573 were for, and 6 against, addition to the multiplant unit, and no ballots were challenged. In the Brackenridge, Pennsylvania, voting group, of approximately 435 eligible voters, 410 ballots were cast, of which 391 were for, and 19 against, addition to the multiplant unit, and no ballots were challenged. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations, the Regional Director conducted an investigation and on September 25, 1968, issued and duly served upon the parties his Report on Objections to the election in which he recommended that all of the objections be overruled and that the Board issue the appropriate unit clarification as provided for in its Decision and Direction of Elections. The Employer filed timely exceptions to the Report, and a supporting brief.

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1. 169 NLRB No. 2.

Board's Supplemental Decision and Order.

The Board has considered the Regional Director's Report, the exceptions and brief, and the entire record in this case, and hereby adopts the Regional Director's findings and recommendations.[2]

Accordingly, as the tally for each voting group shows that a majority of employees in each group, both of which are now separately represented by the Petitioner, wish to be represented by that Union as part of the existing multiplant unit, we find that the appropriate unit for future bargaining is the enlarged, multiplant unit. We shall, therefore, clarify the existing multiplant unit, by including in it all production and maintenance employees at the Employer's Lathrop, California, and Brackenridge, Pennsylvania, plants.

ORDER

IT IS HEREBY ORDERED that the existing multiplant unit now represented by the United Glass and Ceramic Workers of North America, AFL-CIO, CLC, and its Locals, be, and it hereby is, clarified by specifically including in the description of the unit all production and maintenance employees of Libby-Owens-Ford Glass Company employed at its plants located in Lathrop, California and Brackenridge, Pennsylvania.

Dated, Washington, D.C. Dec. 10, 1968

Frank W. McCullouch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

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2. The exceptions and brief, in our opinion, raise no issues which would warrant reversal of the Regional Director's findings and recommendations or require a hearing in this proceeding.

Members Fanning and Jenkins, dissenting:

Without considering the merits of these objections, we reaffirm our dissenting view, expressed in 169 NLRB No. 2, that this election should not have been held.

Dated, Washington, D.C. Dec. 10, 1968

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

Board's Decision and Order

(Filed April 16, 1971)

189 NLRB No. 139

D-4885
Brackenridge, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIBBY-OWENS-FORD COMPANY and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC, and its LOCALS NOS. 1, 5, 9, 19, 33 and 418	Case 6-CA-4771

DECISION AND ORDER

On July 29, 1970, Trial Examiner Paul Bisgyer issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain

affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the Charging Party filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herewith.

Since 1939 the Charging Party has been the certified bargaining representative of certain employees of the Employer in a multiplant unit.[1] On July 13, 1966, the Charging Party filed a petition to clarify that certification by including in that multiplant unit the production and maintenance employees at the Company's plants in Lathrop, California, and Brackenridge, Pennsylvania. Those Lathrop and Brackenridge employees were at that time represented by the Charging Party in separate single plant units. On January 12, 1968, the Board issued a Decision and Direction of Elections,[2] ordering separate self-determination elections among the employees of the respective Lathrop and Brackenridge plants to determine whether or not they desired to be represented as part of the established multiplant unit. The employees at each plant voted in favor of becoming part of the multiplant unit, and on December 10,

1. 10 NLRB 1470.
2. 169 NLRB 126.

1968, the Board issued a Supplemental Decision and Order Clarifying Unit,[3] in which it clarified the certified multiplant unit to include the Lathrop and Brackenridge employees.

The Respondent subsequently agreed to the inclusion of the Lathrop plant employees in the multiplant unit, but has steadfastly refused to include the Brackenridge employees. Thus, when the Brackenridge contract expired on October 1, 1969, Respondent refused to bargain with the Union for the Brackenridge employees as part of the multiplant unit. Nevertheless, the Respondent at all times expressed willingness to bargain with the Union concerning the Brackenridge employees as a separate unit, and indeed such bargaining was conducted culminating in a new contract covering Brackenridge as a separate unit.

It is clear from the record, and the Trial Examiner in effect so concludes, that the Respondent bargained in good faith in fulfillment of its obligation in all respects save for its refusal to acquiesce in the inclusion of the Brackenridge employees in conformity with the Board's aforementioned Decision and Order Clarifying Unit. The sole issue before us is whether the Respondent thus violated Section 8(c)(5) and (1). The Trial Examiner relied on the Board's underlying clarification of the unit and concluded that the Respondent had violated Section 8(a)(5) and (1).

The Respondent herein renews its attack on the proceeding on the UC petition. We find merit in its position. In reaching this result, we reaffirm our dissenting view expressed in the underlying unit clarification case

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3. 173 NLRB No. 187.

reported at 169 NLRB 126, 129, for the reasons fully set forth therein, and conclude that the Board was without statutory authority to direct and conduct the elections in that proceeding.[4] Therefore, the Order Clarifying Unit was of no force or effect, and we shall dismiss the instant complaint as resting on an improper clarification of certification.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. April 16, 1971.

[SEAL]

NATIONAL LABOR RELATIONS BOARD

John H. Fanning, Member

Howard Jenkins, Jr., Member

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4. Member Brown, dissenting, refers to the *McCulloch v. Libbey-Owens-Ford Company* decision of the Circuit Court of Appeals for the District of Columbia, the majority of which expressly stated no opinion on the issue of requisite statutory authority for the holding of those Board-directed elections which the Respondent is challenging. Judge Tamm, however, dissented, as he thought that the power for such elections "should not be self created but should be sought from the Congress."

CHAIRMAN MILLER, concurring:

I join my colleagues who dismiss this complaint, although I reject the reasoning which leads them to our mutual conclusion. The tortuous history of this proceeding, standing alone, should persuade us that the principle which the Board so boldly announced in 1968[5] has proved to have extremely limited utility. The lesson of that history is confirmed by the fact that the Board has consistently refused since 1968 to follow and apply the *Libbey-Owens-Ford* doctrine, even in cases which were virtually indistinguishable.[6] Indeed, in a contemporaneous proceeding involving this Respondent, the Board now declines to adhere to the principle announced in this case. In *Libbey-Owens-Ford Company,* 189 NLRB No. 138, issued this day, we dismiss a UC petition seeking to include a newly constructed plant in the existing multiplant unit.

I conclude from this progression of events, and for reasons briefly outlined below, that we must candidly acknowledge that we have abandoned our earlier decision and that we have reverted to those healthy principles which formerly governed our treatment of multiplant bargaining units. For my part, I welcome the return to those principles. In my judgment, our duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties.

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5. *Libbey-Owens-Ford Company,* 169 NLRB 126; 173 NLRB No. 187.

6. *PPG Industries, Inc.,* 180 NLRB No. 58; *Rohm & Haas Company,* 183 NLRB No. 20.

For all of that, however, I do not subscribe to my majority colleagues' assertion that the Booard was without authority to try the path we now abandon. The initial decision departed from precedent in two notable respects. First, the Board merged several appropriate, single-plant units into a multiplant unit without regard to the consent or opposition of the parties to a long-established bargaining relationship. I do not doubt, however, that our statutory authority to establish "the unit appropriate for the purposes of collective bargaining" included the authority to merge separate units as was done in this case. Indeed, the most vigorous critics of the decision have not seriously asserted any such lack of authority. See, generally, *Abodeely*, 117 U. Pa. L. R. 1075.

The Board's second departure from precedent was in the conduct of an election for purposes other than those specified in Section 9(c). As to this matter, I agree with the original majority decision herein, for the reasons stated, that the statute does not prohibit the conduct of such elections.[7]

Finally, disavowal of our earlier decision is, in my judgment, compelled notwithstanding that law of the case considerations would ordinarily require continued adherence to that earlier decision. Here, such unremitting adherence would produce the anomalous result that only this Respondent would be bound by the *Libbey-Owens-Ford* doctrine and only at the plants which were originally involved. The fact that we now hold that the "doctrine" of this case was never doctrine at all and was, on the contrary, good for that day and train only,

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7. *Libbey-Owens-Ford, supra* at 128-129.

does not require that we leave this Respondent holding the only one-way ticket ever issued.[8]

Dated, Washington, D.C. April 16, 1971.

Edward B. Miller, Chairman
NATIONAL LABOR RELATIONS BOARD

MEMBER BROWN, dissenting:

I would find, as I did in the majority opinion in the underlying unit clarification case, that the elections were valid and the certified unit was properly clarified to include the Brackenridge employees. This view is supported, I believe, by the majority rationale in the underlying unit clarification case as reported at 169 NLRB 126, by the refusal of the court of appeals to enjoin the Board from proceeding in accord with that decision,[9] and by clear considerations of public policy. Accordingly, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union in the certified unit.

Dated, Washington, D.C. April 16, 1971.

Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

MEMBER KENNEDY, dissenting:

The Charging Party filed a petition in July 1966 to clarify its existing certification for Respondent's pro-

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8. *N.L.R.B. v. Pittsburgh Plate Glass Company*, 270 F.2d 167 (C.A. 4, 1959); cert. denied 361 U.S. 943.

9. *McCulloch v. Libbey-Owens-Ford Company*, 403 F.2d 916 (C.A. D.C., 1968), cert. denied 393 U.S. 1016, finding no clear violation of the Act or deprivation of the Company's constitutional rights by the Board, but not passing on the ultimate question of the Board's constitutional authority.

duction and maintenance employees in a multiplant unit by adding to such unit the similar employees of Respondent's Lathrop, California, and Brackenridge, Pennsylvania, plants. Following elections conducted among the employees in these two plants, the Board, in December 1968, issued its Decision in that proceeding,[10] finding that the employees in both the Lathrop and Brackenridge plants were properly included within the scope of the existing multiplant unit.

In my view the decisions and determinations of the Board with respect to unit clarification were, for the reasons set forth in the majority opinion in that proceeding,[11] within the scope of the Board's authority and were not an abuse of the Board's discretion. The Board's eventual determination of the scope of the multiplant unit was a valid one and Respondent was required thereafter to honor it in its conduct of bargaining with the Charging Party. As Respondent has violated this obligation insofar as its Brackenridge plant is concerned, I would therefore find that Respondent has violated Section 8(a)(5) and (1) of the Act, and I would accordingly affirm the Trial Examiner's Decision in this case.

Dated, Washington, D.C. April 16, 1971.

Ralph E. Kennedy, Member
NATIONAL LABOR RELATIONS BOARD

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10. 173 NLRB No. 187.
11. 169 NLRB 126.

APPENDIX D

Decision of The United States Court of Appeals

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO-CLC and its Locals 1, 5, 9, 19, 33 and 418, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Libbey-Owens-Ford Company, Intervenor.
No. 71-1599

United States Court of Appeals
Third Circuit.

Argued April 10, 1972.

Decided June 21, 1972.

Before HASTIE, VAN DUSEN and ALDISERT, Circuit Judges.

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

This petition by the United Glass and Ceramic Workers of North America, AFL-CIO-CLC and its Locals 1, 5, 9, 19, 33 and 418 (Union) challenges an April 16, 1971, order of the National Labor Relations Board (Board) dismissing an unfair labor practice complaint filed by the General Counsel of the National Labor Relations Board. The alleged unfair labor practice was based on the failure of the Libbey-Owens-Ford Company (Company) to bargain collectively with a multiplant unit including its plant in Brackenridge, Pennsylvania. The issues before this court concern existence of a valid determination by the Board that the multiplant unit

was "the unit appropriate for the purposes of collective bargaining."[1]

The Union has been the certified collective bargaining representative of the production and maintenance employees of the company in a multiplant unit since 1939. The size and composition of the multiplant unit has varied as plants were opened and closed and, by July 13, 1966, it included eight plants. At this point the Union filed a unit clarification (U. C.) petition pursuant to the Board's rules, 29 C.F.R. § 102.60(b), to clarify the multiplant unit by adding the Company's plants in Lathrop, California, and Brackenridge, Pennsylvania. These two plants had previously constituted separate bargaining units and the Union was recognized by the Company as the collective bargaining agent for all three units.[2] On September 8 and 9, 1966, a hearing on the U.C. petition was held and all parties appeared and participated. The case was then transferred to the Board and on January 12, 1968, it issued its "Decision and Direction of Election." The majority of the Board found that the existing separate plant units and an employer-wide multiplant unit would be presumptively appropriate. Therefore, it ordered that a self-determination election should be held at the Lathrop and Brackenridge plants to determine which unit the employees of those plants favored. The Board dismissed the Company's ob-

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1. National Labor Relations Act, 29 U.S.C. § 159(b) (Section 9(b)).

2. The Brackenridge Plant was organized by the Union in 1936 and bargained as a separate unit from the time the plant was acquired by the Company in 1943. The Lathrop Plant was newly constructed and had been designated as a separate unit at the time the Union was appointed as the collective bargaining representative.

jection that the U. C. procedure was inappropriate in this situation and that a representation petition under Section 9(c) should have been filed. Libbey-Owens-Ford Glass Company, 169 N.L.R.B. 126 (1968). Board members Fanning and Jenkins dissented on the grounds that there was no statutory authority for the Board to conduct an election in the absence of a question of representation.[3] The Company filed a motion for rehearing, which was denied, and on March 20, 1968, elections were held at which the employees at both the Lathrop and Brackenridge plants indicated their support for the multiplant unit. On December 10, 1968, the Board issued an order clarifying the existing multiplant unit to include the Brackenridge and Lathrop plants.[4]

During the period between the hearing on the U. C. petition and the issuance of the Board's order clarifying the unit, the Company opened a new plant for the pro-

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3. Abodeely, The NLRB and The Unit Clarification Petition, 117 U.Pa.L.Rev. 1075 (1969). See note 5, *infra.*

4. The long delay in these proceedings resulted from the Company's institution of proceedings in the United States District Court for the District of Columbia. On March 8, 1968, the district court issued an injunction restraining the Board from conducting the self-determination elections on the grounds that there was no statutory authority for such elections in the absence of a question of representation. Libbey-Owens-Ford Co. v. McCulloch, 57 L.C. 77, Civil Action No. 507-68 (D.D.C. 1968). The injunction was dissolved on appeal on the ground that the court had no jurisdiction to review the Board's determination in a representation proceeding absent a showing of a violation of a clear, specific and mandatory provision of the Act by the Board. McCulloch v. Libbey-Owens-Ford Glass Co., 131 U.S. App.D.C. 190, 403 F.2d 916 (1968). *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154, 61 S.Ct. 908, 85 L.Ed. 1251 (1941).

duction and fabrication of glass in Mason City, Iowa. On August 10, 1967, the Union filed a representation petition, asking to be certified as a collective bargaining agent for a unit consisting of the Mason City employees, and on December 8, 1967, they were so certified by the Regional Director.

In subsequent contract negotiations, the Company agreed to the inclusion of the Lathrop Plant employees in the multiplant unit but refused to include the Brackenridge employees.[5] When the Brackenridge contract expired on October 1, 1969, the Company continued in its refusal to bargain with the employees of that plant as part of the multiplant unit, but did bargain with them as a separate unit. As a result, the Union filed an unfair labor practice charge against the Company for its refusal to bargain with the multiplant unit which had been certified by the Board. On December 31, 1969, the General Counsel of the Board filed the complaint in the unfair labor practice proceeding.[6] The Company, in its answer to the complaint, asserted that the underlying unit clarification determination was not supported by the evidence and was made in excess of the Board's authorized powers. A hearing was scheduled for March 25, 1970.[7] The hearing examiner refused to consider the

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5. The Company also refused requests that the Mason City Plant be included in the multiplant unit.

6. After the issuance of the complaint, the Union and the Company continued to bargain and on February 7, 1970, entered into a contract which covered only the Brackenridge employees.

7. The Company, in its answer, for the first time attacked the Board's finding that the multiplant unit was presumptively appropriate on the grounds that it was not employer-wide since it failed to include the Mason City Plant. On the morning of the hearing, a U. C.

validity of the underlying U. C. proceeding and found that an unfair labor practice had been committed. The Company filed exceptions to the trial examiner's decision and renewed its attack on the underlying U. C. proceeding.

On April 16, 1971, the Board issued its decision and order and, by a 2-1-2 vote, refused to enforce the decision of the trial examiner and dismissed the complaint. Members Fanning and Jenkins adopted the rationale of their prior dissents in the underlying U. C. proceeding and held that the Board did not have sufficient statutory authority to direct and conduct the self-determination elections. The order clarifying the unit, therefore, could have no force or effect and could not serve as the basis for the complaint.

Chairman Miller concurred in the result but disagreed with the finding that the Board lacked statutory authority to conduct the elections. He reasoned that the Board had not followed the *Libbey-Owens-Ford* doctrine in its subsequent cases and that a return to the prior procedure of "leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties" would best fulfill the Board's duty to foster stable collective bargaining relationships. The two remaining members voted to enforce the decision of the trial examiner.

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petition was filed to include the Mason City Plant in the multiplant unit. At the hearing counsel for the Company moved that the new U. C. proceeding be consolidated with the unfair labor practice proceeding and that a continuance be granted to permit investigation of the new petition. A similar motion, including a request for reopening and reconsideration of the earlier U. C. proceeding, was filed before the Board on April 23, 1970, and was denied by an order of June 8, 1970.

[1-3] In reviewing the Board's dismissal of the unfair labor practice complaint, this court must examine the underlying unit determination since the unit proceeding and the complaint are really one.[8] Normally a challenge to a ruling of the Board determining the appropriate bargaining unit is not subject to direct review and must await an unfair labor practice complaint predicated upon the unit determination.[9] In the instant action, the Company has challenged at all stages of this proceeding not only the Board's finding of the appropriate unit but the authority of the Board to make such a determination in the manner and under the procedures that it did. In dismissing this complaint, the Board relied on its determination that the underlying U. C. order was involved and thus could not serve as the basis for an unfair labor practice complaint. While we agree that it was proper for the Board to examine the validity of its underlying unit determination,[10] we

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8. Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U.S. 146, 154-158, 61 S.Ct. 908, 85 L.Ed. 1251 (1941); N. L. R. B. v. New Enterprise Stone and Lime Co., 413 F.2d 117, 118 (3d Cir. 1969); N. L. R. B. v. Certified Testing Laboratories, 387 F. 2d 275, 279 (3d Cir. 1967).

9. See note 4, *supra*.

10. Normally matters determined in an underlying certification proceeding may not be relitigated in a subsequent unfair labor practice case absent newly discovered or previously unavailable evidence or a significant change in circumstances. Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U.S. 146, 161-162, 61 S.Ct. 908, 85 L.Ed. 1251 (1941); N. L. R. B. v. Certified Testing Laboratories, Inc., 387 F.2d 275, 279 (3d Cir. 1967); C.F.R. § 102.66 (f). This policy, however, cannot act as a bar to Board reconsideration of its authority to conduct a subsequent clarification proceeding. *See* In re N. L. R. B., 304 U.S. 486, 492, 58 S.Ct. 1001, 82 L.Ed. 1482 (1938).

have concluded that the reconsideration of this issue required a finding by at least a majority of the Board of the appropriateness of the units involved and we remand for such a determination.

The company raises two separate grounds of invalidity of the Board's actions in this case. The first is that the U. C. proceeding was an unauthorized mechanism for the consolidation of existing collective bargaining units under the statutory language, and the second is that the Board lacked the authority to conduct an election in the absence of a question of representation.

[4] As to the first contention, we find that the Board acted within its statutory authority in conducting a U. C. proceeding designed to consider the merger of existing collective bargaining units. The Board is granted broad powers under Section 9(b) of the Act to determine appropriate bargaining units,[11] and is

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11. "(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect

granted the authority under Section 10(d) to change or modify its order in such manner as it may deem proper any time prior to the filing of a court challenge to the order.[12] Pursuant to these powers, the Board adopted its U. C. procedures which are embodied in Rule 102.60(b):

> "A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer."

The rule was adopted in recognition of the fact that changes in circumstances might necessitate changes in a collective bargaining arrangement and that initial unit determination made in a representation proceeding are not immutable.

In Carey v. Westinghouse Corp., 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1963), the Supreme Court sanctions the use of the U. C. procedure. The Court relied on the existence of a dispute which was representational in nature as the predicate for invoking the U. C. procedure. A representational dispute was described as one "involving the duty of the employer to bargain collectively with the representative of the employees as provided in § 8(a) (5)."

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property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." 29 U.S.C. § 159(b) (1970).

12. 29 U.S.C. § 160(d) (1970).

[5] In *Carey* the representational dispute involved the inclusion of a disputed category of employees in an existing collective bargaining unit. The U. C. procedure has traditionally been used in such cases and in those where additional employees are claimed as an accretion to an existing unit. In these type cases, the dispute is representational in that the collective bargaining representative of certain employees is at issue. In the instant case, the dispute is not representational in the same sense because the only dispute relates to unit scope. However, it is representational in the broader sense that it involves a question of representation for purposes of collective bargaining in an appropriate unit.[13] The existence of such a representational dispute involving only unit scope is sufficient to allow the Board to utilize its U. C. procedure.[14]

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13. In *Carey*, after setting out the existence of a controversy involving the duty of an employer to bargain collectively with the representative of the employees as provided in § 8(a) (5) as the basis for a representational dispute, the court quoted § 8(a) (5), as follows:

> "It shall be an unfair labor practice for an employer—. . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

It then went on to say, "Section 9(a) provides that the representatives shall be chosen by the majority of employees 'in a unit appropriate' for collective bargaining, 29 U.S.C. § 159(a). Section 9(b) gives the Board authority to determine what unit is an appropriate one. . ." It follows that a question involving unit scope is a representational one since a refusal to bargain with a unit found to be appropriate could serve as the basis for an 8(a) (5) violation.

14. The Company contends that the U. C. procedure cannot be used unless a "question of representation" as

Chairman Miller, in his concurring opinion, stated that although he found ample authority to establish the unit appropriate for the purposes of collective bargaining, including the authority to merge existing units, he felt that the Board's duty to foster stable collective bargaining relationships was better discharged by leaving such questions to be worked out by the parties. We assume that on remand, given its authority to combine existing units, the Board will consider the desirability of exercising this authority in light of its obligation to select units which will further the policies of the Act.[15]

The Company's second contention is that the Board lacked the authority to conduct the election in the absence of a question of representation. We disagree and find that the Board does have the requisite authority; however, in this case, a majority of the Board failed to make the necessary finding of appropriateness which is a prerequisite of such elections.

[6, 7] Section 9(b) of the Act provides that "The Board shall decide . . . the unit appropriate for the purposes of collective bargaining . . ." and such determina-

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contemplated by § 9(c) exists. *See* Abodeely, The NLRB and The Unit Clarification Petition, 117 U.Pa.L.Rev. 1075 (1969). The U. C. rule, by its terms, is inapplicable where a question of representation, as opposed to a representational dispute, is involved. A dispute may be representational in the § 9(c) sense and not rise to the level of a question of representation. The mere absence of such a 9(c) representational issue in the instant case does not deprive the Board of the authority to conduct the proceeding in view of the existence of a representational issue under § 9(a) and (b).

15. *See* Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1972).

tion may be made in the absence of a question of representation.[16] Employee views are highly relevant to such determinations,[17] and, in the absence of statutory prohibition, the Board has implied powers to solicit such views.[18] Ancillary to its authority to determine whether existing bargaining units should be merged, the Board has implied authority to determine all relevant facts, including employee preference, by the most practical means available.[19]

[8] The finding of authority to conduct the questioned elections does not end our analysis of this case. Elections of employees to determine their preference in a U. C. proceeding are only proper in the limited situation where the Board has made a finding that two or more units are equally appropriate. Absent such a finding of mutually appropriate units, the Board, by conducting an election to determine employees' preference, im-

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16. See note 14.

17. Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 156, 61 S.Ct. 908, 85 L.Ed. 1251 (1941); N.L.R.B. v. Ideal Laundry and Dry Cleaning Co., 372 F.2d 307, 308 (10th Cir. 1967); N.L.R.B. v. Underwood Machinery Co., 179 F.2d 118 (1st Cir. 1949); N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876, 880 (3d Cir. 1943).

18. Section 11 of the Act grants broad investigative powers, including the right to issue subpoenas, to the Board in order to conduct "all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 9 and 10."

19. The Board clearly has authority to subpoena employees to solicit their views or to dispatch Board employees to canvass a plant. An election is a clearly more practical and less cumbersome means of soliciting such views. Cf. N.L.R.B. v. Weyerhaeuser Co., 276 F.2d 865, 872 (7th Cir. 1960).

properly delegates to the employees its statutory obligation to determine the appropriate unit.[20] We agree with the reasoning expressed in N.L.R.B. v. Weyerhaeuser Co, 276 F.2d 865, 872 (7th Cir. 1960), that an election is proper only in those circumstances where the Board has first fulfilled its statutory obligation to select an appropriate bargaining unit.

In the instant case, the Board majority in the underlying U. C. procedure first determined that both the single-plant Brackenridge unit and the employer-wide unit were presumptively appropriate and then ordered the election. Members Fanning and Jenkins relying on their position that the Board had no statutory authority to conduct the election, did not make a determination of the appropriateness of either unit. In the unfair labor practice decision, members Fanning and Jenkins relied on their earlier dissents and once again expressed no opinion on the appropriateness of the unit.

By reconsidering in 189 N.L.R.B. No. 139 (Opinion of April 16, 1971) the U. C. order of 1963,[21] we conclude that members Fanning and Jenkins were obligated to express their opinion on the appropriateness of the unit before turning to the issues raised by the election. In such reconsideration proceeding, the Board did not fulfill its statutory duty to determine the appropriateness of the unit, since a majority of the Board expressed no opinion on this question.

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20. Marshall Field and Co. v. N.L.R.B., 135 F.2d 391 (7th Cir. 1943).

21. In their majority opinion, members Fanning and Jenkins stated: "The Respondent herein renews its attack on the proceedings on the UC petition. We find merit in its position."

[9, 10] Members Fanning and Jenkins, as well as Chairman Miller, have not indicated whether they are in agreement with the earlier determination of the Board that the two units were presumptively appropriate.[22] We remand for such a determination unless a majority of the Board adheres to Chairman Miller's view that, under the circumstances of this case, the determination of the unit should be left to collective bargaining or decides not to proceed with the issues presented by this petition for review for other reasons.[23]

The April 16, 1971, order will be vacated with directions that the Board reconsider its case 6-CA-4771 in light of this opinion.

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22. We cannot merely assume that their absence of comment indicates acceptance of the earlier Board finding. The Board must state reasons for its finding of appropriateness. *See* N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965); Local 167, Upholsterers' International Union of North America v. N.L.R.B., 419 F.2d 179, 182 (3d Cir. 1969).

23. On remand, the Board, under its discretionary powers to consider information which could have been presented at an earlier proceeding, may find that the existence of the Mason City Plant as a separate bargaining unit prohibits a finding that the allegedly employer-wide unit is presumptively appropriate. While it is true that the Board is not obligated to consider evidence in an unfair labor practice proceeding unless it was previously unavailable or newly discovered, N.L.R.B. v. Puritan Sportswear Corp., 385 F.2d 142 (3d Cir. 1967), this rule does not prohibit the Board from considering evidence which it feels may aid in its determination.

APPENDIX E

NLRB Supplemental Decision and Order

202 NLRB No. 15

D-7091
Brackenridge, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIBBEY-OWENS-FORD COMPANY and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC, and its LOCALS NOS. 1, 5, 9, 19, 33 and 418[1]	Case 6-CA-4771

SUPPLEMENTAL DECISION AND ORDER

This case is before the Board pursuant to a decision of the United States Court of Appeals for the Third Circuit[2] remanding for further consideration the Board's Decision and Order reported in 189 NLRB No. 139. It seems appropriate, for a better understanding of the issues remanded, to summarize the prior Board decisions involving the Respondent (herein also called the Company) and the Union.

Since 1939, the Union has been the certified[3] bargaining representative in a multiplant bargaining unit

1. Herein collectively called the Union.

2. *United Glass and Ceramic Workers of North America, AFL-CIO-CLC v. N.L.R.B.*, 463 F.2d 31 (1972).

3. 10 NLRB 1470. The Union was certified in a unit of the "production and maintenance employees of Libbey-Owens-Ford Company, Toledo, Ohio, including watchmen, janitors, firemen, power employees, truck drivers, and subforemen, and excluding window-glass

consisting of the Company's production and maintenance employees at plants located in Rossford and Toledo, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana.[4] In addition, the Company has recognized the Union as the collective-bargaining representative of its production and maintenance employees at two other plants, located at Brackenridge, Pennsylvania, and Lathrop, California, each plant being recognized as a separate unit with separate collective-bargaining agreements.[5]

On July 13, 1966, the Union filed a unit clarification petition (6-UC-4) requesting the Board to clarify the existing certified multiplant unit, then consisting of eight plants, by adding to such unit the employees represented by it in separate single-plant units at the Employer's Brackenridge and Lathrop plants. On January 12, 1968, the Board issued its Decision and Direction of Elections[6] finding that the separate plant units and the

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cutters, supervisory employees, timekeepers, and clerical employees not directly connected with production, at its plants situated in Shreveport, Louisiana; Ottawa, Illinois; Charleston and Parkersburg, West Virginia; and Rossford and East Toledo, Ohio." The Parkersburg, West Virginia, plant became a separate unit as a result of the Board's decision in 31 NLRB 243 (April 23, 1949), and was sold by the Company in 1958.

4. The Company has two plants located in each of the following cities: Rossford, Toledo, and Ottawa.

5. The Company purchased the Brackenridge plant in 1943 and built the Lathrop plant in 1962.

6. 169 NLRB 126. Members Fanning and Jenkins, dissenting, were of the opinion that the Board lacked statutory authority to conduct unit clarification elections in situations where no question concerning representation is raised.

multiplant unit are equally appropriate, and directing elections among the employees at the Brackenridge and Lathrop plants to determine whether or not they desired to be represented by the Union as part of the multiplant unit.[7]

On December 10, 1968, the Board issued a Supplemental Decision and Order Clarifying Unit[8] in which it found that a majority of the eligible employees in each of the two single-plant units had voted in favor of merger with the multiplant unit and ordered that the multiplant unit be clarified by specifically including therein the employees previously represented by the Union in single-plant units at the Brackenridge and Lathrop plants.

Subsequently, the Company agreed to include the Lathrop plant employees in the multiplant unit, but refused to include the Brackenridge plant employees. Thus, when the Brackenridge contract expired on October 1, 1969, the Company refused to bargain with the Union for the Brackenridge employees as part of the multiplant unit.[9] The Union thereupon filed the unfair labor

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7. The Board also ordered the existing multiplant and Brackenridge plant units clarified by excluding from such units individuals employed as guards within the meaning of the Act.

8. 173 NLRB 1231. Members Fanning and Jenkins, dissenting, reaffirmed their views expressed in 169 NLRB 126, 129, that the Board acted without statutory authority in directing the unit clarification elections.

9. The Company at all times expressed willingness to bargain with the Union concerning the Brackenridge employees as a separate unit, and indeed such bargaining was conducted and resulted in a new contract covering these employees in a separate unit.

practice charges in the instant proceeding (6-CA-4771) alleging that the Respondent's refusal to bargain with the Union on behalf of the Brackenridge plant employees as part of the clarified multiplant unit violated Section 8(a)(5) and (1) of the Act.

On July 29, 1970, Administrative Law Judge[10] Paul Bisgyer issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in the unfair labor practices alleged and recommending that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Decision and a brief in support thereof, and the Charging Party (the Union) filed a brief in answer to the Respondent's exceptions.

On April 16, 1971, the Board issued its Decision and Order[11] in this proceeding dismissing the complaint in its entirety.[12] Members Fanning and Jenkins reaffirmed their earlier dissenting views, expressed in 169 NLRB 126, 129, and concluded that the Board was without statutory authority to direct and conduct the elections in the underlying unit clarification proceeding and that,

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10. The title of "Trial Examiner" was changed to "Administrative Law Judge," effective August 19, 1972.

11. 189 NLRB No. 139.

12. Members Brown and Kennedy, in separate dissents, were of the opinion that the Board had the requisite authority to conduct the unit clarification elections and that the subsequent clarification of the certified unit was valid and proper in all respects and required the Respondent thereafter to bargain with the Union in the clarified unit. Its failure to do so, therefore, violated Sec. 8(a)(5) and (1) of the Act.

therefore, "the Order Clarifying Unit was of no force or effect." In these circumstances, they concluded, the unfair labor practice complaint must be dismissed "as resting on an improper clarification of certification." Chairman Miller, concurring, agreed that the complaint should be dismissed, not because of any lack of statutory authority,[13] but for policy reasons. Noting that "the Board has consistently refused since 1968 to follow and apply the *Libbey-Owens-Ford* doctrine, even in cases which were virtually indistinguishable," he concluded that the Board's "duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in the size of a multiplant bargaining unit to be worked out by agreement of the parties."

Thereafter, on June 21, 1972, the United States Court of Appeals for the Third Circuit issued its decision[14] remanding the proceedings to the Board for further consideration. The court held that the unit clarification procedure is an appropriate mechanism for consolidating existing appropriate bargaining units and that the Board possessed the requisite statutory authority to conduct the clarification elections at the Lathrop and Brackenridge plants.

The Court, however, remanded the case to the Board because:

> [W]hile we agree that it was proper for the Board to examine the validity of its underlying unit de-

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13. In Chairman Miller's view, the "statutory authority to establish the unit appropriate for bargaining purposes included the authority to merge separate units as was done in this case."

14. *United Glass and Ceramic Workers of North America, AFL-CIO v. N.L.R.B.*, 463 F.2d 31.

termination, we have concluded that the reconsideration of this issue required a finding by at least a majority of the Board of the appropriateness of the units involved and we remand for such a determination.

The court further stated at 463 F.2d at 37-38:

In the instant case, the Board majority in the underlying U. C. procedure first determined that both the single-plant Brackenridge unit and the employer-wide unit were presumptively appropriate and then ordered the election. Members Fanning and Jenkins relying on their position that the Board had no statutory authority to conduct the election, did not make a determination of the appropriateness of either unit. In the unfair labor practice decision, members Fanning and Jenkins relied on their earlier dissents and once again expressed no opinion on the appropriateness of the unit.

By reconsidering in 189 N.L.R.B. No. 139 [sic] (Opinion of April 16, 1971) the U.C. order of 1968, we conclude that members Fanning and Jenkins were obligated to express their opinion on the appropriateness of the unit before turning to the issues raised by the election. In such reconsideration proceeding, the Board did not fullfill its statutory duty to determine the appropriateness of the unit, since a majority of the Board expressed no opinion on this question.

Members Fanning and Jenkins, as well as Chairman Miller, have not indicated whether they are in agreement with the earlier determination of the Board that the two units were presumptively appropriate. We remand for such a determination unless a majority of the Board adheres to Chair-

man Miller's view that, under the circumstances of this case, the determination of the unit should be left to collective bargaining or decides not to proceed with the issues presented by this petition for review for other reasons.

The Board having reconsidered its Decision and Order in light of the court's opinion and remand order, has accepted the circuit court's opinion as the law of this case. In so doing, we have considered our underlying unit clarification decisions[15] as well as the Administrative Law Judge's Decision and the exceptions and briefs in the unfair labor practice proceeding, and the record as a whole.

For the reasons stated in the underlying unit clarification decision, we reaffirm the unit determination there made. In our opinion, the Board's finding in that case that the single-plant and multiplant units constituted equally appropriate units for bargaining was proper and correct. And, having accepted the court's opinion as the law of this case, we now further find that the Respondent was obligated to bargain with the Union as the exclusive bargaining representative of its employees in the clarified 10-plant unit described in our Supplemental Decision and Order Clarifying Unit.[16] It follows, therefore, that by refusing at that time to bargain with the Union on behalf of its Brackenridge employees as part of such unit, the Respondent violated Section 8(a)(5) and (1) of the Act.[17] Accordingly we

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15. 169 NLRB 126 and 173 NLRB 1231.

16. 173 NLRB 1231.

17. The fact that the Company opened another plant after our initial unit determination does not affect our conclusion that such unit determination was proper and correct when made.

find that a bargaining order is warranted and necessary to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Libbey-Owens-Ford Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with United Glass and Ceramic Workers of North America, AFL—CIO, CLC, and its Locals Nos. 1, 5, 9, 19, 33, and 418, as the exclusive representatives of the Company's employees in the multiplant unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

(1) All production and maintenance employees who are employed at the Company's Plate, Safety and Thermopane Glass plants located at Toledo, Ohio; Rossford, Ohio; and Ottawa, Illinois; and its Window Glass plants located at Charleston, West Virginia, and Shreveport, Louisiana, excluding employees in the Window Glass plants who are in the bargaining unit represented by the Window Glass Cutters League of America and guards, supervisors and clerical employees not directly connected with production; (2) All production and maintenance employees who are employed at the Respondent's plants located at Brackenridge, Pennsylvania, excluding clerical employees not directly connected with production and guards and supervisors as defined in the Act; and (3) All hourly paid produc-

tion and maintenance workers employed by Respondent at its Lathrop, California, plant, excluding salaried employees, guards, janitors, office clerical workers and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union, as the exclusive representative of the Brackenridge plant employees as part of the above-described unit, at such time as provided for in the current Brackenridge agreement, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Brackenridge, Pennsylvania, copies of the attached notice marked "Apprendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

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18. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Mar. 1, 1973

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
JOHN A. PENELLO, Member
[SEAL] NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MILLER, dissenting:

I dissent from the findings and conclusions of my colleagues and remain of the view that our unit clarification procedures were improvidently invoked here for the purpose, not of "clarifying" the parameters of an existing unit, but rather of *combining,* over the objections of one of the parties, an admittedly appropriate unit with some other unit or units. I would so hold regardless of whether the combination would result in yet another appropriate unit.

And where, as here, a respondent (whether an employer or a union) is willing to continue good-faith bargaining in an admittedly appropriate preexisting unit, which has not, by any changed circumstances been rendered inappropriate, I would not find such a respondent guilty of a violation of our Act merely because the respondent will not consent to a demand that it aban-

don that unit and bargain in some other unit instead. In my view, any such combination of clearly appropriate units should be consensual. Nothing should prohibit the parties from voluntarily effectuating such combinations, but, as I interpret the Act, there is no statutory foundation for finding a party in violation of the Act when such party is complying with the statutory mandate, which requires only that it bargain in good faith in *an* appropriate unit.

I recognize that "law of the case" considerations might suggest that my views be subordinated in deference to the prior decision in the unit clarification proceeding herein in the interests of institutional stability. Nevertheless I believe those considerations are overridden both by the importance of the policy question and the inequity inherent in joining in the issuance of this "last oneway ticket," as I explained in my earlier opinion in this case.

For the above reasons, I would dismiss the complaint herein.

Dated, Washington, D.C. Mar. 1, 1973

EDWARD B. MILLER, Chairman
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to recognize and bargain collectively with United Glass and Ceramic Workers of North America, AFL—CIO, CLC, and its Locals Nos. 1,

5, 9, 19, 33, and 418, as the exclusive representatives of the Company's Brackenridge employees as part of the multiplant unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

> (1) All production and maintenance employees who are employed at the Company's Plate, Safety and Thermopane Glass plants located at Toledo, Ohio; Rossford, Ohio; and Ottawa, Illinois; and its Window Glass plants located at Charleston, West Virginia, and Shreveport, Louisiana, excluding employees in the Window Glass plants who are in the bargaining unit represented by the Window Glass Cutters League of America and guards, supervisors and clerical employees not directly connected with production; (2) All production and maintenance employees who are employed at the Respondent's plant located at Brackenridge, Pennsylvania, excluding clerical employees not directly connected with production and guards and supervisors as defined in the Act; and (3) All hourly paid production and maintenance workers employed by Respondent at its Lathrop, California, plant, excluding salaried employees, guards, janitors, office clerical workers and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL bargain collectively, upon request, with the above-named Union, as the exclusive representative of our Brackenridge plant employees as part of the above-described unit at such time as provided for in our

current Brackenridge bargaining agreement with the above-named Union, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed agreement.

LIBBEY-OWENS-FORD COMPANY
(Employer)

Dated .....

By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisons may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412—644—2977.

APPENDIX F

Decision of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1515

LIBBEY-OWENS-FORD COMPANY,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO-CLC, and its LOCALS Nos. 1, 5, 9, 19, 33 and 418,
Intervenor

ON PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued December 17, 1973
Before VAN DUSEN, ALDISERT and ROSENN,
Circuit Judges

Nicholas Unkovic, Esq., Leonard L. Scheinholtz, Esq. and William D. Armour, Esq., Reed Smith Shaw & McClay, Esqs., Pittsburgh, Pa. and Edward E. Hiett, Esq., Toledo, Ohio, Attorneys for Petitioner

Peter G. Nash, Esq., General Counsel; John S. Irving, Esq., Deputy General Counsel; Patrick Hardin, Esq., Associate General Counsel; Elliott Moore, Esq., Deputy Associate General Counsel; Robert A. Giannasi, Esq., Assistant General Counsel; and Fredric Sagan, Esq., Counsel; NLRB, Attorneys for Respondent

Emil Oxfeld, Esq. and Abraham L. Friedman, Esq., Rothbard, Harris & Oxfeld, Newark, New Jersey and David Clayman, Esq., Columbus, Ohio, Attorneys for Intervenor

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OPINION OF THE COURT

(Filed Mar. 8, 1974)

VAN DUSEN, *Circuit Judge.*

This case is before this court upon the petition of Libbey-Owens-Ford Company (hereinafter the "Company") to review and set aside a Supplemental Decision and Order of the National Labor Relations Board issued on March 1, 1973, and reported at 202 N. L. R. B. No. 15. The Board has made a cross-application for enforcement of that order. This court has jurisdiction over these proceedings by virtue of Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f).

The Company, an Ohio corporation, with its main offices in Toledo, Ohio, is engaged in the manufacture and sale of glass and glass products. On January 30, 1939, the Board certified the United Glass and Ceramic Workers of North America, AFL-CIO-CLC (hereinafter the "Union"), as the collective bargaining representative in a single bargaining unit consisting of the Company's production and maintenance employees at eight plants located in Ottawa, Illinois, Charleston, and Parkersburg, West Virginia, Rossford and Toledo, Ohio, and Shreveport, Louisiana. *Libbey-Owens-Ford Glass Company*, 10 N. L. R. B. 1470 (1939).[1] The Company and

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1. The plant at Parkersburg, West Virginia, was removed from the multi-plant unit in 1941, pursuant to the Board decision in *Libbey-Owens-Ford Glass Company*, 31 N. L. R. B. 243 (1941). In 1958, the Company sold this plant.

Union have maintained a continuing bargaining relationship since the certification. Subsequently the Company recognized the Union as the collective bargaining representative also for the production and maintenance employees at two other plants, each of which was recognized as a separate unit with a separate bargaining agreement. One plant, located in Brackenridge, Pennsylvania, was recognized by the Company in 1943, after being acquired by purchase; the second plant, located in Lathrop, California, was recognized in 1962, shortly after it was constructed by the Company.

On July 13, 1966, the Union filed a unit clarification petition (6-UC-4) to clarify the existing multi-plant unit by including the represented employees in the single plant units at Brackenridge and Lathrop. Following a hearing on the petition, the Board issued a Decision and Direction of Election on January 12, 1968, in which it found that the existing separate units and an enlarged multi-plant unit were both appropriate and therefore ordered separate self-determination elections at the Lathrop and Brackenridge plants to permit the employees in the affected single-plant units to determine whether or not they were to be included in the larger, multi-plant unit. 169 N. L. R. B. 126 (1968). Board members Fanning and Jenkins dissented, being of the opinion that the Board lacked statutory authority to hold elections to determine the unit placement of represented employees.

The Company and the Union, in the interim, continued to bargain for the Lathrop plant as a separate unit until the multi-plant negotiations in October 1968. At that time, the Union demanded that the Brackenridge plant, the Lathrop plant, and a new plant at Mason City, Iowa, be included in the multi-plant unit. The Company

steadfastly refused to include Brackenridge or Mason City but did include Lathrop in the multi-plant unit.

On December 10, 1968, following the directed elections held on March 20, 1968, the Board issued a Supplemental Decision and Order, in which it found that a majority of the employees in each of the two separate plant units had voted in favor of merger with the multi-plant unit and ordered that the multi-plant unit be clarified by including the Brackenridge and Lathrop plants. 173 N. L. R. B. 1231 (1968). Members Fanning and Jenkins dissented on the basis of their earlier opinion that this election should not have been held.

When the Brackenridge contract expired on September 30, 1969, the Company refused to add the Brackenridge plant as a part of the multi-plant unit and refused the Union's demands that the provisions of the multi-plant contract be made applicable to Brackenridge employees. The Union filed an unfair labor practice charge against the Company on October 13, 1969 (6-CA-4771), alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on behalf of the Brackenridge employees as part of the Board-clarified multi-plant unit. Thereafter an unfair labor practice complaint issued and a hearing was held.[2] In his decision, issued on July 29, 1970, the Administrative Law Judge held that he was bound by

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2. At the hearing in the unfair labor practice case, the Union also filed a petition for clarification (6-UC-43) to include the Mason City, Iowa, plant as part of the multi-plant unit. The Company moved to have the petition made a part of this case, but the Administrative Law Judge denied that motion. On April 16, 1971, the Board (with members Brown and Kennedy dissenting) handed down its decision dismis-

the Board's prior decision in the unit clarification case and that the Company had, therefore, committed an unfair labor practice by refusing to recognize and bargain with the Union as the duly certified representative of the Brackenridge employees as part of the multi-plant unit.

On April 16, 1971, the Board (with members Brown and Kennedy dissenting) issued its Decision and Order dismissing the complaint. 189 N. L. R. B. 871 (1971). Members Fanning and Jenkins based their decision to dismiss on their previously stated view that the Board did not possess statutory authority to determine unit placement of represented employees by conducting elections to clarify existing bargaining units. Chairman Miller concurred in dismissing the complaint, not because of any lack of statutory authority, but because "the Board has consistently refused since 1968 to follow and apply the *Libbey-Owens-Ford* doctrine, even in cases which were virtually indistinguishable," and because the Board's "duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties." Members Brown and Kennedy, in separate dissents, indicated that they viewed the underlying certification to be a proper exercise of the Board's authority, that the Company was under a duty to honor that certification, and that its failure to do so constituted a violation of

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sing the petition to include the Mason City plant in the multi-plant unit. 189 N. L. R. B. 869 (1971). Members Fanning and Jenkins voted for dismissal for the reasons stated in their dissenting opinions in 169 N. L. R. B. 126, 129, and Chairman Miller, for the reasons stated in his concurring opinion in 189 N. L. R. B. 871, 871-72.

its duty to bargain imposed by Section 8(a)(5) and (1) of the Act.

Thereafter, the Union filed a petition to review and set aside the Board's decision with this court. On June 21, 1972, we issued our decision remanding the proceedings to the Board for further consideration. *United Glass and Ceramic Workers of North America v. N. L. R. B.*, 463 F. 2d 31 (3d Cir. 1972). We held that the Board acted within its statutory authority in conducting a unit clarification proceeding designed to consider the merger of existing collective bargaining units and that the Board had the requisite authority to conduct the elections at the Brackenridge and Lathrop plants. We noted, however, that because of their respective views of the case, neither members Fanning and Jenkins nor Chairman Miller had passed on the appropriateness of both a multi-plant unit including the Brackenridge plant and of the Brackenridge single-plant unit. Accordingly, the case was remanded to the Board to make such a determination, unless a majority of the Board adheres to the view advanced by Chairman Miller that the determination of the unit should be left to collective bargaining or decides not to proceed with the case for other reasons.

On March 1, 1973, the Board (with Chairman Miller dissenting) issued its Supplemental Decision and Order, in which it reaffirmed its view that the single-plant and multi-plant units constituted equally appropriate units for bargaining for the reasons stated in the initial unit clarification decision. Thus, the Board found that the Company was obligated to bargain with the Union as the exclusive bargaining representative of its employees in the clarified multi-plant unit, and that by refusing

to bargain with the Union on behalf of its Brackenridge employees as part of such unit, the Company violated Section 8(a)(5) and (1) of the Act. On April 9, 1973, the Company filed a motion for reconsideration of the Board's Supplemental Decision and Order, which the Board denied in an order dated May 18, 1973.

The only issue raised by the Company's petition to review and set aside the Board's Supplemental Decision and Order of March 1, 1973, is whether the Board's underlying unit determination was erroneous. In reviewing that determination, this court is mindful of the fact that the Board is granted broad powers under Section 9(b) of the Act to determine appropriate bargaining units.[3] Thus, the Supreme Court has declared that such a determination "involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485, 491 (1947). See also *N. L. R. B. v. New Enterprise Stone & Lime Co.*, 413 F. 2d 117, 119 (3d Cir. 1969); *N. L. R. B. v. David Friedland Painting Co.*, 377 F. 2d 983, 987 (3d Cir. 1967). Nevertheless, as the Supreme Court also observed in *Packard Motor Car, supra*, a determination of a unit of representation may be so unreasonable and arbitrary as to exceed the Board's power.

I.

The Company challenges the Board's unit determination on two grounds. First, it argues that the Board's

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3. "(b) The Board shall decide in each case whether, in order to assure the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U. S. C. § 159(b).

finding in the unit clarification proceeding, that a multi-plant bargaining unit which included the Brackenridge plant is appropriate, is not supported by substantial evidence on the record as a whole.[4] The Company contends that the record in this case fails to establish, and indeed demonstrates, the absence of a number of factors generally considered relevant to the issue of the appropriateness of a multi-plant unit.[5] Although this contention appears correct as to the absence of some of these factors, it nevertheless does not preclude the Board from finding that the inclusion of the Brackenridge plant in the unit is appropriate. In determining whether certain employees should be grouped together for collective bargaining, the Board is free to consider a wide variety of factors, and the presence or absence of one or even several of them is not necessarily determinative of the case. See *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 156 (1941).[6] As the Su-

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4. In *Packard Motor Car, supra* at 491, the Supreme Court made it clear that the scope of review, insofar as the Board's unit determination depended on facts, was limited to whether there was substantial evidence to support the Board. See also *N. L. R. B. v. Industrial Rayon Corp.*, 291 F. 2d 809 (4th Cir. 1961); *N. L. R. B. v. Plankinton Packing Co.*, 265 F. 2d 638 (7th Cir. 1959).

5. The Company claims that the evidence demonstrates the absence of such factors as a history of multi-plant bargaining that includes the plant in question, centralization of management, employee inter-change among plants, similarity of skills and functions of employees, inter-dependence or functional integration of operations, and geographical proximity.

6. The Court in *Pittsburgh Plate Glass, supra*, stressed such factors as the wishes of the employees, the similarity of the working duties and conditions, the character of the various plants, and the anticipated effectiveness of the bargaining unit in maintaining industrial peace.

preme Court pointed out in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 331 U. S. 416, 422-23 (1947), the Board's unit determinations "are binding upon reviewing courts if grounded in reasonableness," which "necessarily implies that the Board has given due consideration to all relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict."

In its July 12, 1968, decision, the Board based its determination that an enlarged multi-plant unit was appropriate primarily on two factors: first, that the history of bargaining between the Company and the Union demonstrates a pattern of successful bargaining in a unit of widely scattered plants which are not functionally or operationally integrated, and, second, that the Brackenridge and Lathrop plants do not differ significantly from those plants which, over the years, have been successfully integrated into a single, multi-plant unit. 169 N. L. R. B. 126, 127-28. We believe that such reasoning shows a careful consideration by the Board of all the relevant factors and serves the purpose of assuring that the unit in question will be a viable bargaining unit. The only remaining question, therefore, is whether the two elements relied on by the Board are supported by substantial evidence in the record.

The existence of a pattern of successful bargaining in an expanding multi-plant unit is not disputed. The record reveals that for the past 40 years the Company and the Union have been bargaining on a multi-plant basis, and during that period the unit has been enlarged as the Company has acquired new plants. Thus, the unit found appropriate by the Board was virtually employer-wide—encompassing all but two of the Com-

pany's plants then in existence.[7] It is true, as the Company observes, that there is also a history of successful bargaining between the Company and the Union in the single-plant unit at Brackenridge. However, that fact alone does not conflict with the Board's finding that the inclusion of Brackenridge in the multi-plant unit would also be appropriate, for there is no reason to infer that a history of successful bargaining within a single-plant unit would interfere with successful bargaining by the same parties on a broader basis.[8]

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7. As the Board noted, neither party sought their inclusion in the multi-plant unit, since one was an experimental plant manned solely by technical employees, and the other was a subsidiary engaged in the production of plastic and metallic dies, patterns, and molds. 169 N. L. R. B. 126, n. 5.

The later establishment of a new plant at Mason City was not relevant to the Board's decision, since, as the Board noted in its Supplemental Decision and Order of March 1, 1973, "the unit determination was proper and correct when made." 202 N. L. R. B. No. 15 at n. 17. Moreover, nothing in the record indicates one way or the other whether the Mason City plant would also be includable in the multi-plant unit, based on the criteria applied with respect to Brackenridge, for the Board dismissed the Union's petition to merge Mason City into the multi-plant unit for the same reasons it originally dismissed the complaint in the instant case. 190 N. L. R. B. 869.

8. The Company also cites as evidence of the difficulty in merging Brackenridge into the multi-plant unit the differences in benefits, and in particular the fact that the pension benefit in the multi-plant unit was $4.25 per month per year of service, while the normal pension for Brackenridge was $2.50 per month per year of service. The reason for this variation, according to the testimony of Mr. Burwell, is that Brackenridge employs over 50% women, many of whom are secondary wage earners whose interests are less in pensions than in money in other areas. This difference does not appear

The Company does dispute, however, the Board's finding that Brackenridge does not differ significantly from the other plants in the multi-plant unit. That finding was based on an examination of three factors—location, plant integration, and similarity of operations. After a careful review of the record, we hold that the Board's conclusion as to each of these factors is supported by substantial evidence. First, the testimony of Melvin B. Burwell, Vice President, Employee Relations, of Libbey-Owens-Ford Glass Company, supports the Board's finding that the then-existing eight-plant unit "encompassed plants which are between 4 and 986 miles from the Employer's home office in Toledo, Ohio, and hence is not based on any geographical considerations, while the Brackenridge and Lathrop plants are 240 and 2,367 miles from Toledo, respectively." 169 N. L. R. B. 126, 128. Second, in light of the evidence demonstrating the operational independence of the plants within the multi-plant unit, the Board could reasonably conclude that "there is generally no greater functional or operational integration between the plants in the multiplant unit than between either of the two disputed plants and the others." *Id.* Third, the testimony of Mr. Burwell also supports the Board's finding that of the eight plants

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to be a complete obstacle to successful bargaining between the Company and an enlarged multi-plant unit which included Brackenridge. In his testimony at the initial hearing on the unit clarification petition, Mr. Burwell also adverted to a similar difficulty in dovetailing the youthful Lathrop workforce into the multi-plant pension system, but, as noted above, the Company later agreed to the inclusion of Lathrop. It is not the function of this court to pass on the wisdom of multi-plant bargaining as being in the best interests of the Brackenridge employees, who voted overwhelmingly (391 to 19) for inclusion in the multi-plant bargaining unit.

in the multi-plant unit, "five produce raw plate glass and fabricate it, while the other three [like Brackenridge] are engaged solely in fabrication," and that "all the plants involved are engaged in essentially the same basic operations in that all are producing and fabricating glass and/or glass products." *Id.* at 127.

The Company challenges this last finding by pointing out that Brackenridge no longer produces any products which are typically multi-plant operations[9] and that, as the Board noted, Brackenridge is the only plant which fabricates filmed surface glass products and mirrors. This operation includes both conventional silvering of glass by mechanical deposition and the more complex application of metallic films by thermal evaporation in a vacuum. Thus, the Company argues, the skills and functions of employees in the Brackenridge plant are not similar to those in a window glass, plate glass, or float glass plant. However, in view of our approval of the Board's approach to the unit determination in this case, the issue is not whether the skills involved at Brackenridge differ from those found elsewhere in the multi-plant unit, but whether such difference is greater than that found among the other plants. Since the unit includes plants using a wide variety of techniques for producing and fabricating glass and requiring differing levels of skill and organization, the Board could reasonably infer that the inclusion of Brackenridge's employees would not introduce a significant new element of diversity.

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9. At the initial hearing in this case, there was testimony that although Brackenridge was then engaged in the production of automotive ventilators, that aspect of the business was being phased out.

II.

Second, the Company also argues that the Board's unit determination in this case is arbitrary, discriminatory and inconsistent with Board policy applied in other cases. See *Hotel Employees v. Leedom*, 358 U. S. 99 (1958); *Office Employees International Union v. N. L. R. B.*, 353 U. S. 313 (1957); *N. L. R. B. v. Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4th Cir. 1959), *cert. denied*, 361 U. S. 943 (1960). The Company points out that in every decision subsequent to the unit clarification in this case, the Board has dismissed unit clarifications seeking mergers into larger units. *Rohm & Haas Co.*, 183 N. L. R. B. No. 20 (1970); *Cities Service Oil Co.*, 182 N. L. R. B. 12 (1970); *PPG Industries, Inc.*, 180 N. L. R. B. 477 (1969).[10] Nevertheless, this difference in result does not constitute an arbitrary discrimination against Libbey-Owens-Ford Company. *Rohm & Haas* and *PPG Industries* involved companies in the same industry as the Company here, and the facts of those cases closely resemble those in the instant case. However, in both cases, members Jenkins and Fanning voted to dismiss on the grounds rejected by this court here, namely, that the Board lacked statutory authority to merge units, while a single member, member Zagoria, in *PPG Industries* and Chairman McCulloch in *Rohm & Haas*, respectively regarded the instant case as distinguishable because the unit here was virtually employer-wide and was based on a substantial history of

10. The Company also cites *American Saint Gobain Corp.*, Case Nos. 6-AC-13 and 6-UC-23, where petitions filed by the Union were dismissed by the Regional Director on the authority of *PPG Industries*. Since this was not a decision of the Board, it has little bearing on the question of discrimination and need not be considered.

multi-plant bargaining. Since those cases were not appealed, the issue of appropriateness was not determined by a Board majority in either case, and thus the difference in result between those cases and this one is not attributable to a discriminatory application of Board policy. *Cities Service,* on the other hand, is distinguishable from the instant case in that the union there did not represent all the employer's plants, but rather was seeking to merge three unrepresented plants with an existing multi-plant unit, and the proposed multi-plant unit was considerably less than employer-wide, since 12 plants would have remained unrepresented.

Finally, the Company contends that the Board's unit determination in this case is inconsistent with the goal of stabilizing industrial relations, see *Kalamazoo Paper Box Corp.*, 136 N. L. R. B. 134, 137 (1962), for the Union's constitution and by-laws require the unanimous vote of all members of the wage committee to accept a contract, and thus as a member of that committee Brackenridge could prevent the consummation of a multi-plant agreement. To the extent that one important purpose of a unit determination is to foster efficient and stable collective bargaining, that end is accomplished where, as here, the Board correctly finds that a sufficient community of interest exists among the workers in the proposed unit to ensure that such unit will be viable for bargaining purposes. The fact that inclusion in the multi-plant unit may increase the bargaining power of the Brackenridge employees should not serve as a basis for exclusion.

III.

The dissenting opinion contends that because the Board has found that the combination of pre-existing

units is an appropriate bargaining unit, the unit determination in this case should be subjected to special scrutiny and that the Board's decision should not be upheld unless there is evidence to support a conclusion that labor relations will be positively improved by the merger. This approach assumes that the merger of two pre-existing units "will inevitably have a significant negative effect upon stability in labor relations." No data is presented to support this assumption, and indeed the facts of this case indicate the contrary.[11] On this record, the Lathrop plant has been successfully integrated into the multi-plant unit, and there is no evidence to suggest that that merger had any adverse impact on the labor relations or operations of either the Lathrop plant or any of the other plants within the multi-plant unit. Also, the approach of the dissenting opinion fails to give sufficient weight to the preference of the Brackenridge employees, which in this case was overwhelmingly in favor of merger.[12]

We therefore see no reason to depart from the doctrine that a unit determination by the Board should be disturbed only if it is unreasonable or arbitrary, and that thus the Board may find appropriate the combina-

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11. Recognizing the problem presented by the language in note 4 of the dissenting opinion, we note that the situation described there is not presented by the record in this case.

12. See *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. at 156. See also *N. L. R. B. v. Ideal Laundry and Dry Cleaning Co.*, 372 F. 2d 307, 309 (10th Cir. 1967), where the court said, "Indeed, we think the relevancy of the wishes of employees concerning their inclusion or exclusion from a proposed bargaining unit is inherent in the basic right to self organization under § 7 of the Act."

tion of two pre-existing units so long as there is evidence that there is a sufficient community of interest among the workers in the proposed unit to insure that the merged unit will also be a viable one. While we would not necessarily have made the same determination as the Board in this case, for the reasons discussed above, we cannot say it was beyond the Board's power.

For the foregoing reasons,[13] the petition of the Company to review and set aside the March 1, 1973, Supplemental Decision and Order of the Board will be denied, and the Board's cross-application for enforcement of that order will be granted.

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13. All other contentions of the Company have been considered and rejected.

TO THE CLERK:

Please file the foregoing opinion.

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Circuit Judge

Re: LIBBEY-OWENS-FORD COMPANY, Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO-CLC, and its LOCALS NOS. 1, 5, 9, 19, 33 and 418, Intervenor

No. 73-1515

ROSENN, *Circuit Judge*, Dissenting:

I dissent because I believe that the Board's finding as appropriate the inclusion of the Brackenridge plant in the multi-plant unit was arbitrary, unreasonable, and not supported by substantial evidence.

This appeal presents for review one of the most important issues in modern labor relations, the proper determination of the employee unit which is appropriate for collective bargaining between a union and an employer.[1] The problem is compounded, and its impact on the stability of labor relations magnified, because the issue raised here concerns altering a plant unit deemed appropriate for bargaining by both union and management since 1943.

I agree with the majority that the sole issue for review on this appeal is whether the Board's underlying determination as to the appropriateness of the ten-plant bargaining unit including the Brackenridge plant was

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1. "[U]nit determination may profoundly affect labor management relations and constitutes a heavy proportion of the work of the NLRB." Samoff, *Law School Education in NLRB Representation Cases*, 21 Lab. L.J. 691, 695 (1970), *quoting* Dean Bok in Discussion, Proceedings of the 19th Annual Winter Meeting, Industrial Relations Research Association at 99-104 (1966).

erroneous.[2] The majority states that the Board's determination that the multiplant unit was appropriate was based upon two factors. First,

> the history of bargaining between the company and the Union demonstrates a pattern of successful bargaining in a unit of widely scattered plants which are not functionally or operationally integrated,

and second,

> the Brackenridge . . . plant [does] not differ significantly from those plants which, over the years, have been successfully integrated into a single, multi-plant unit.

The majority concludes that the foregoing reasoning by the Board "shows a careful consideration of all the relevant factors" and is supported by substantial evidence in the record. I respectfully disagree.

We first note that the determination as to the appropriate bargaining unit in the instant case does not arise in the typical "question of representation" proceeding under §9(c)(1) of the National Labor Relations Act. Such a proceeding arises when an employer declines

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2. I agree with the view originally expressed by Board members Fanning and Jenkins that the Board does not have statutory authority to conduct employee elections in a unit clarification proceeding such as this involving the merger of two previously appropriate units. *See* 169 NLRB No. 2 (concurring and dissenting opinion). In my opinion the Board exercised a power neither directly nor impliedly supported by the National Labor Relations Act.

I am constrained, however, to accept this court's holding on the prior appeal as the law of this case. I do not believe that the prior holding is decisive of the issue raised on this appeal.

to recognize the representative of unorganized employees who allege that they desire collective bargaining.

In the present case, however, there is no question as to which union is to represent the Brackenridge employees. There is no ambiguity or dispute over unit description, no change in employment patterns, no allegation of accretion to the bargaining unit, no dispute over job classification, and no allegations of operational changes in the unit. Rather, the union simply desires to merge two of its own established bargaining units and alter the historical relationship between the employer and the Brackenridge employees. The union unilaterally seeks this goal through Board intervention after failing to achieve that goal through free collective bargaining.[3]

The present case thus involves the attempt by one party to a collective bargaining agreement to combine two established bargaining units, not through negotiations, but by bringing an action before the Board to combine the units over the objection of the other party. I believe that the use of unit clarification proceedings by the Board for this purpose runs counter to the national policy in favor of free collective bargaining, and

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3. The union first requested in October 1965 that the Brackenridge employees be included in the multi-plant unit. The request was then refused by the company and dropped by the union. The union made the same request in the October 1969 multi-plant negotiations, but the company refused. When the separate Brackenridge contract expired in September 1969, the company again refused the union's demand that the multi-plant contract be made applicable to the Brackenridge employees.

will inevitably have a significant negative effect upon stability in labor relations.[4]

I accept as the law of the case the holding that the Board does have the authority to "clarify" units in order to combine two preexisting bargaining units by declaring the combined unit "appropriate." However, I do not believe the standards of appropriateness in such a situation should be the same unrestrictive standards that would govern were the Board to determine in the first instance in a "representation" proceeding the unit in a plant or plants appropriate for collective bargaining. Rather, when the combination of two *preexisting units* is to be deemed an appropriate bargaining unit, the Board's determination should be scrutinized with care because of the concomitant disruption to preexisting labor relations which is likely to result. I believe that only affirmative and convincing reasons should justify the Board's finding that the combined unit is "appropriate" in a situation such as this.

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4. For example, a union decides to organize two plants of an employer. It is apparent to the organizer that the union has a better chance of winning at plant "A" than at plant "B". It therefore petitions for a single unit at plant "A" and after winning the election is certified on a single unit basis. Later when chances of success at plant "B" seems [sic] brighter, it petitions for an election at plant "B" on a single unit basis. It wins the election and is certified, again on a single-plant unit basis. It then petitions for clarification of the unit to include both plants. The process can continue *ad infinitum* as the union continues to "nibble away" at the employer. Such a procedure does not lead to industrial stability—it leads to chaos, confusion and conflict.

Brief of Employer at 48, PPG Industries, Inc., No. 6-UC-8 (N.L.R.B., filed December 9, 1966) *quoted in* Abodeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075, 1100 (1969).

Turning now to the bases of the Board's decision as described by the majority, the reasoning is that the company has had successful multi-plant bargaining in the past, and there is no reason why addition of the Brackenridge plant to the multi-plant unit will alter that pattern. I do not find either of these considerations particularly helpful. The thrust of this reasoning is that the merger of the units will not adversely affect the expanded multi-plant unit. It ignores completely the effect that such merger may have upon the established labor relations, commitments and operations at the single-plant unit. It says nothing about why the present separate units are inadequate, and it says nothing about the Board's own conclusion about whether labor relations will be improved or hurt by the merger. I do not believe that the merged unit can be deemed "appropriate" in these circumstances unless the Board can present some positive justifications for a conclusion that labor relations will be *improved* by the merger.

The majority finds it unnecessary to consider factors other than those considered by the Board. For this it relies on a quotation from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 313 U.S. 416, 422-23 (1947), stating that the Board's unit determinations

> are binding upon reviewing courts if grounded in reasonableness . . . . A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict.

I do not believe, however, that the Board's determination in a case such as this is "grounded in reasonable-

ness" when the Board gives little or no weight to the factors which militate against the merger of two preexisting bargaining units. I cannot say that the Board "has given due consideration to all the relevant factors" when it treats the determination of "appropriateness" in the present case in the same way as it treats the question in the *absence* of two preexisting bargaining units. I cannot say that the Board "has correlated the policies of the Act with whatever public or private interests may . . . be in conflict" when it applies a *per se* rule that the merged unit is appropriate simply because it would have been appropriate in the first instance.

The Board gives little or no weight to numerous factors which I believe weigh heavily against a finding that the merged unit is "appropriate." The Board considers the history of multi-plant bargaining, but gives little weight to the uninterrupted history of separate bargaining by the Brackenridge plant since its acquisition in 1943. The Board considers as mere "technical problems" the fact that only "bargaining history and employer opposition have prevented" the establishment of the combined unit. While the Board may consider these factors "technical," in my opinion they go to the heart of the matter at issue.

I would also place considerable weight on the question of whether the unit to be merged out of existence is functionally or operationally integrated with the larger unit. The Board concedes that "there is no basis for concluding that the operations of the various plants are integrated." In fact, the Brackenridge plant is completely autonomous. It has its own plant manager and managerial staff. It hires and discharges its own employees. It makes its own work assignments, and does

not interchange its production and maintenance employees with employees in other plants. There is no interplant seniority. The Brackenridge plant manager reports to the vice president in charge of special products manufacturing, while the plant managers in the multi-plant unit report to a vice president in the managing area. Brackenridge does its own customer billing, prepares its own payrolls, and does its own purchasing and invoicing.

The wages, pensions, and fringe benefits at Brackenridge differ from those at the multi-plant unit. The Brackenridge work force is over fifty percent women, a significantly greater proportion of women than the other plants. A plant executive testified that they were secondary wage earners, less interested in pensions than in other areas of compensation.

The Board apparently gives some weight to the secret ballot election it conducted among the Brackenridge employees after it found that the merged unit would be appropriate. This reliance on employee preference, however, is not decisive[5] and heretofore has never been utilized by the Board except in representation proceedings. In any event, if the Board is to rely upon the preferences of the Brackenridge employees, it should also be obliged to poll the employees in the

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5. In refusing to conduct a similar election in the unit clarification proceedings in Pittsburgh Plate Glass Industries, 180 N.L.R.B. 477 (1969), the Board stated:

> Our "informed discretion"—to use the words of the Supreme Court in the *Packard* case (330 U.S. 485, 491)—tells us that in circumstances such as these the Board should not gamble on stability of bargaining by delegating to employees choice of the enlargement of the multi plant unit. . . ."

existing multiplant unit to determine whether they favor or oppose the addition of the Brackenridge employees to their unit. These employees might well oppose the merger, particularly if they felt that the enlargement of the unit might complicate or protract labor negotiations.

Neither before nor after this case has the Board upheld an attempt by means of a unit clarification petition to merge two preexisting units over the opposition of one party to the collective bargaining agreement with the units.[6] For example, in *Bath Iron Works Corp.*, 154 N.L.R.B. 1069 (1965) employees in both the parent and the wholly-owned subsidiary were represented by the same union, albeit in separate bargaining units. When the parent merged the subsidiary into itself and operated the former subsidiary as a division, the union argued before the Board that the bargaining units should be merged because the employees in both units performed essentially the same duties. The employer, on the other hand, contended that the division should remain a separate unit because the employees possessed distinct skills and performed distinct functions. The

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6. Since its inception the unit clarification petition has been used only where there has been some change in the employment pattern. The creation of a new job classification, the movement of personnel, or the acquisition of a new plant have all involved some change which would clearly affect the delineation of the existing bargaining unit. Where, however, there has been no change in the employment pattern, the Board has found no need to clarify the bargaining unit. Unfortunately, the decision in *Libbey-Owens-Ford* completely ignored these precedents.

Abodeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075, 1091 (1969).

Board refused to combine the units, finding no significant change in the operations of the former subsidiary. The Board held that although it could not say that *only* separate units would be appropriate, the corporate reorganization had not "effected such changes in the status of the employees as would require us to find that the two units have been merged." The Board thus held that even though the merged unit might be appropriate, the considerations *in favor* of the merged unit had not been established.[7] In the present case, of course, the Board relies solely upon a finding of "appropriateness" for permitting the merger of the units without taking into account any reasons why the merged unit would be preferable to the preexisting separate units.

Nor has the unit clarification procedure which the Board adopted in its decision of January 12, 1968, ever been applied to a single case which arose after that decision. As Chairman Miller noted in his concurring opinion to the Board's Decision and Order of April 16, 1971, dismissing the unfair labor practice complaint,

> The tortuous history of this proceeding, standing alone, should persuade us that the principle which the Board so boldly announced in 1968 has proved to have extremely limited utility. The lesson of that history is confirmed by the fact that the Board has consistently refused since 1968 to follow and apply the *Libbey-Owens-Ford* doctrine, even in cases which were virtually indistinguishable.

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7. *See also* Remington Office Machines et al., 158 N.L.R.B. 994 (1966); Univac Division, Sperry Rand Corporation et al., 158 N.L.R.B. 997 (1966); Welsh Co. et al., 145 N.L.R.B. 713 (1964).

> I conclude from this progression of events, and for reasons briefly outlined below, that we must candidly acknowledge that we have abandoned our earlier decision and that we have reverted to those healthy principles which formerly governed our treatment of multi-plant bargaining units. For my part, I welcome the return to those principles. In my judgment, our duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multi-plant bargaining unit to be worked out by agreement of the parties.

189 N.L.R.B. No. 139 (1971) (concurring opinion).

Nor has the Board applied the doctrine to any cases since Chairman Miller wrote these words in 1971. This was recognized by Chairman Miller in his dissent to the March 1, 1973, Supplemental Decision and Order which is here on a petition for review. 202 N.L.R.B. No. 15 (1973) (dissenting opinion).

The majority attempts to distinguish the cases denying unit "clarification" since 1968, either on their facts or on the grounds that the Board's statutory authority was not established on appeal at the time they were decided. It cannot, however, avoid the fact that the doctrine has yet to be applied to any case other than the one at hand. I agree with Chairman Miller that there is "inequity inherent in joining in the issuance of this 'last oneway ticket.'" *Id.*

I would grant the company's petition to set aside the order and I would deny the Board's application for enforcement.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1515

LIBBEY-OWENS-FORD COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO-CLC, and its LOCALS NOS. 1, 5, 9, 19, 33 and 418,
Intervenor

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by petitioner and the answer to such petition in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Rosenn would grant rehearing.

By the Court,

VAN DUSEN
Judge

Dated: June 13, 1974

Supreme Court of the United States
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-263

LIBBEY-OWENS-FORD COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Counter-Statement of the Case	3
Argument	17
Conclusion	22

Cases Cited

Beaumont Forging Co., 110 NLRB 2200 (1954)	20
Cities Services Oil Co., 182 NLRB 12 (1970)	20
Libbey-Owens-Ford Glass Co. v. Frank W. McCullough, 57 LC, par. 15,552, 67 LRRM 2712	8
Libbey-Owens-Ford Company v. NLRB, et al., 495 F. 2d 1195 (3 Cir. 1974)	16, 19-21
McCullough v. Libbey-Owens-Ford Glass Co., 403 F. 2d 916, 131 U. S. App. D. C. 190 (June 9, 1968)	8
Miratile Mfg. Co., 124 NLRB 48 (1959)	20
NLRB v. Jones & Laughlin Steel Corp., 331 U. S. 416 (1947)	19
NLRB v. New Enterprise Stone & Lime Co., 413 F. 2d 117 (3 Cir. 1969)	17
Owens-Illinois Glass Co., 136 NLRB 389	5, 15, 18

PAGE

Packard Motor Car Co. v. NLRB, 330 U. S. 485 (1947) 17

PPG Industries, Inc., 180 NLRB, No. 58 ..... 13, 20

Pittsburgh Plate Glass Industries, 180 NLRB 477 (1969) 17

Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 (1941) 18

Rohm & Haas Company, 183 NLRB, No. 20 ..... 13, 20

Western Electric Company, Inc., 98 NLRB 1018 (1952) 18

Statute Cited

National Labor Relations Act, as amended:

Sec. 8(a) 3

Sec. 8(a)(1) 2, 3, 10

Sec. 8(a)(5) 2, 3, 10

Sec. 9(a) 3, 17

Sec. 9(b) 3, 17

Sec. 9(c)(1) 3

Other Authority Cited

The NLRB and the Unit Clarification Petition, 117 U. Pa. L. Rev. 1075, 1098 (1969) 21

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA IN OPPOSITION

Opinions Below

The National Labor Relations Board's original Unit Clarification Decision and Direction of Elections (Case No. 6-UC-4) is reported at 169 NLRB No. 2 (1968) (App.

A of Petition). The Board issued a Supplemental Decision and Order Clarifying Unit which is reported at 173 NLRB No. 187 (1960) (App. B of Petition). The Board's decision and Order dismissing the refusal to bargain charge (App. C of Petition) is reported at 189 NLRB No. 138 (1971).

The Decision of the Court of Appeals for the Third Circuit remanding the case to the Board (App. D. of Petition) is reported at 463 F. 2d 31 (3 Cir. 1972). The Board then issued a Supplemental Decision and Order in which it reaffirmed its underlying unit determination (202 NLRB No. 15 (1973)) (App. E of Petition). The Decision of the United States Court of Appeals for the Third Circuit enforcing the Board's Order (App. F of Petition) is reported at 495 F. 2d 1195 (3 Cir. 1974). The Court of Appeals unreported Denial of Petitioners Petition for Rehearing (June 13, 1974) is found at Appendix G of Petition.

Jurisdiction

Petitioner adequately set forth the jurisdictional requisites.

Questions Presented

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to honor a prior Board unit clarification which merged existing single-plant units, appropriate for bargaining, into a multi-plant unit, also found appropriate by the Board.

Statutes Involved

The Petition adequately sets forth Sections 9(a), (b), and (c)(1) of the National Labor Relations Act, as amended. However, Sections 8(a) (1) and (5) of the Act are also involved.

Section 8(a) of the Act provides:

> "It shall be unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.
>
> * * *
>
> (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a).

Counter-Statement of the Case

The Union was first certified as representative of the production workers of the Employer on January 30, 1939 (10 NLRB 147) in a multiplant unit which has grown by the addition of other plants since then. By July 13, 1966, the Employer and Union were bargaining in 3 units as follows:

1. A multiplant unit of 8 plants in Ohio, Illinois, West Virginia and Louisiana;
2. A single plant unit at Brackenridge, Pennsylvania (known as Liberty Mirror Plant); and
3. A newly constructed single plant at Lathrop, California.

On July 13, 1966 the Union filed a unit clarification petition (6-UC-4) asking the Board to clarify the multiplant

unit by adding thereto both the Lathrop, California and Brackenridge, Pennsylvania plants.

A formal representation hearing w s held at Pittsburgh, Pennsylvania on September 8 and , 1966. During the hearing an extensive stipulation was put in concerning the history of labor relations in the various plants. From this stipulation and the testimony at the hearing the following data is assemble[1]:

Plant No.	*Location*	*No. of Employees Represented by Petitioner*[1]	*Local Union No.*	*Miles Distant Fr Home Offi (Toledo Oh*
4	Toledo, Ohio	1,017	9	4
8	Toledo, Ohio	1,315	9	4
6	Rossford, Ohio	2,329	9	5
9	Rossford, Ohio	325	9	5
16	Brackenridge, Pa.	383	33	240
5	Ottawa, Ill.	711	19	291
7	Ottawa, Ill.	947	19	291
1	Charleston, W. Va.	826	1	305
2	Shreveport, La.	584	5	986
10	Lathrop, Calif.	452	418	2,267
	Total	8,889		

[1] Figures are as of June 30, 1966. At Plant 1, 115 glass cutters and at Plant 2, 66 glass cutters are represented by the Window Glass Cutters League of America in an old craft unit; all other workers except supervisors and clerical employees are represented by the petitioner.

[2] Plants are arranged in this list in order of increasing distance from the Employer's home office in Toledo, Ohio.

The Employer's witnesses testified that one important reason (if not the most important) in resisting amalgamation of all 10 plants into 1 unit was that at Brackenridge, Pa. female employees amounted to over 50% of the work force; that females in plants Nos. 8 and 7 totalled 181 and that females in the 8 plant multiplant unit (including Plants 7 and 8) totalled 240 out of a total employment of 8,056, whereas in Brackenridge alone females amounted to 55% of the employees and males only 45% and total employment there was 383 employees. The Employer was much concerned to find that female employees are less concerned about pension than in immediate money payments. On October 18, 1966 the Regional Director issued his Order transferring the case to the Board.

One year and 3 months later, on January 12, 1968 the Board issued its Decision and Direction of Election (3 to 2) directing elections not in the 8 plants covered by the multiplant contract, but Globe type elections separately in the single plant units of the Brackenridge, Pennsylvania plant and of the Lathrop, California plant, the question on the ballots to be "whether or not the employees now separately represented by the petitioner wish to be represented by that Union as part of the multiplant" unit now existing.[3]

The majority of the Board found that separate plant units and an employer-wide unit are equally presumptively appropriate.[4] However, separate historical units do not *automatically* merge where the operations are not integrated or the parties do not mutually intend to effect a

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[3] 169 NLRB No. 2.

[4] Citing in fn. 10 *Owens-Illinois Glass Co.*, 136 NLRB 389, 392.

consolidation. Here, the Employer had not only failed to agree to such a merger, but vigorously opposed it on various grounds. The Board found no merit in the Employer's position that the Union was required to resort to a representation proceeding to resolve the issue; and held that while the Board could reach and determine such an issue in a representation case, there was no reason why that should be the only route for the resolution of the question: and that it was not the best route either, where, as in this case, there was no actual question concerning representation because the Employer does not dispute the Union's representative status at any of the plants.

The majority of the Board therefore concluded:

> "We conclude from the above review of outstanding principles and the arguments herein that the Petitioner has adopted a procedure which would appear to encompass its desired relief. We are unable to perceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and only the technical problems of bargaining history and employer opposition have prevented its establishment."

The majority of the Board further stated that:

> "Nor, in considering the equities of the positions of the Employer and of the Union, does there appear to be any justification, in the circumstances here, for affording absolute power to either one to compel the other to bargain in the three historical units rather than combining them into one presumptively appropriate employer-wide unit of glass industry plants. Thus the existing multiplant unit is virtu-

> ally employer-wide, and there is no question that the Petitioner represents the employees at all the 10 plants. In a dispute such as this, it appears to us that the wishes of the disputed employees themselves should be so solicited and that some means should be afforded by which they may indicate their desires. Indeed, such a need is suggested by the Employer's criticism of a possible grant of the Union's request in its argument that a proceeding under 9 (c) would give such an opportunity. Further, an outright rejection of this petition would leave the parties with no early sources of relief by which the Unit issue may be resolved and would serve merely to prolong the labor dispute. Such a result would unquestionably fail to promote the purposes and policies of the Act and would constitute a failure by this Board to fulfill its statutory function to decide in each case the appropriate unit and to afford a peaceful means for doing so."

The majority of the Board therefore directed the Globe type or self-determination elections only at the Brackenridge, Pa. and Lathrop, Calif. plants to ascertain whether the employees in both or either plant wished to be added to and included in the multiplant unit.

A two member minority of the Board was of the opinion that there was no statutory authority for conducting elections in this kind of situation.

The Employer filed a motion for rehearing and reconsideration which the majority of the Board denied on February 13, 1968 as containing nothing not previously considered by the Board and no issues which were not adequately presented and argued previously.

Delay in holding the directed elections and in issuing the Supplemental Decision and Order Clarifying Unit was occasioned by the Employer's institution of proceedings in the United States District Court for the District of Columbia to restrain the Board from conducting said elections (*Libbey-Owens-Ford Glass Co.* v. *Frank W. McCullough et als.*, Civil Action No. 507-68); and an injunction was granted by the District Court on March 8, 1968.[5] The District Court's decision was based on the conclusion that in directing an election in the 2 plants in the absence of a "question of representation" the Board acted in excess of and contrary to the statutory authority conferred on it by the National Labor Relations Act. The injunction was partially stayed by the Court of Appeals to permit the elections, but the Board was not to issue any order based on the results; and the injunction was subsequently reversed for lack of court jurisdiction[6] and certiorari was denied the Employer.[7]

Meanwhile on March 20, 1968 the directed elections had been held and resulted in the employees voting at the respective Lathrop (573 for and 6 against) and Brackenridge (391 for and 19 against) plants overwhelmingly in favor of becoming part of the multiplant unit.

Finally, on December 10, 1968 the Board (3 to 2) issued a Supplemental Decision and Order Clarifying Unit:[8]

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[5] 57 LC, ¶15,552; 67 LRRM 2712.

[6] *McCullough* v. *Libbey-Owens-Ford Glass Co.*, 403 F2d 916, 131 US App. DC 190 (June 9, 1968).

[7] 393 US 1016 (Jan. 13, 1969).

[8] 173 NLRB No. 187.

therein it found that the appropriate unit for future bargaining was the 10-plant multiplant unit, having enlarged the former 8-plant unit to include the production and maintenance employees at the Lathrop and Brackenridge plants.

During the pendency of the unit clarification proceeding, there was in effect a contract between the employer and the Union covering the 8-plant unit, which was due to expire on October 25, 1968. After the directed elections were held, and on August 12, 1968, the Union, pursuant to the terms of that contract, served notice of termination on the respondent and a request to negotiate a new contract. By letter dated August 16, 1968, to the employer, the Union requested that the Lathrop plant employees be merged with the then existing multiplant unit and advised that, should no agreement be reached on this issue, the Union would exercise its right to strike the Lathrop plant. Thereafter, the Union proposed the inclusion in a new multiplant contract of the Lathrop and Brackenridge plants. The employer, however, ultimately acceded only to the addition of the Lathrop plant to prior 8-plant multiplant unit and that plant was covered by the parties' multiplant contract, effective October 25, 1968, for a term ending October 25, 1971. With respect to the Brackenridge plant, the employer declined to discuss its inclusion because the contract covering those employees had a later expiration date.

In anticipation of the exipration of the Brackenridge, Pa. collective bargaining agreement the Union by letter dated July 24, 1969 had given notice of its expiration and requested negotiations. By letter dated September 25, 1969, the Union expressly requested the inclusion of the Brackenridge unit employees into the multiplant unit but the Employer steadfastly refused to agree thereto. By letter dated September 29, 1969 the Union offered a way

out of the deadlock and on September 30, 1969 served a formal demand upon the Employer that it comply with the Board's order and include the Brackenridge, Pa. employees in the multiplant unit and contract. By letter dated October 1, 1969, the Union informed the Employer that it had no alternative but to litigate the issue of the inclusion of the Brackenridge plant in the multiplant unit. The Employer answered refusing to do so. The Union sent a telegram to its members saying it would institute appropriate proceedings (with copies to Company counsel and Employee Relations Director). Negotiations continued and an agreement was executed February 11, 1970 effective as of October 1, 1969 with special contingent provisions regarding litigation as to whether the Employer was obliged to include the Brackenridge plant in the multiplant unit.[9]

Meanwhile on October 13, 1969 the Union had filed an unfair labor practice charge accusing the Employer of not bargaining in accordance with the Board's decision because it had not agreed to include Brackenridge in the multiplant agreement. On December 31, 1969 General Counsel issued an unfair labor complaint accusing the Employer of violating Sections 8(a)(1) and (5) of the Act by the aforesaid conduct. Meanwhile, as noted above, the Employer and Union had entered into a conditional separate agreement as to Brackenridge. The respondent Employer filed an answer to the complaint challenging the authority of the Board to decide as it did in the UC case.

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[9] These special provisions prevented the question from becoming moot, and prevented the agreement from being deemed a waiver by the Union of its right to insist on its rights under the Board's order.

The Employer filed another motion entitled "Application for Reopening, Reconsideration, Modification or Setting Aside of Orders" etc., which the Board denied by order dated June 8, 1970.

On July 29, 1970 the Trial Examiner filed his Decision finding and concluding that:

> "By refusing to recognize and bargain with the Union, as the duly certified representative of the Brackenridge employees as part of the appropriate clarified multiplant unit since on or about October 1, 1969, the Respondent violated Section 8(a)(5) of the Act and thereby interfered with, restrained and coerced employees in the exercise of guaranteed rights in violation of Section 8(a)(1) of the Act."

The Trial Examiner recommended that the Employer should cease and desist from refusing to recognize and bargain collectively with the Union as the exclusive representative of the Company's employees in a unit consisting of the 10 plants and take affirmative action necessary to effectuate the policies of the Act of bargaining collectively with the Union as the exclusive representative of the Brackenridge plant employees as part of the 10-plant unit.

The Employer filed Exceptions to the Record and Proceedings and to the Trial Examiner's Decision on September 3, 1970. In due course the Board issued its Decision and Order on April 16, 1971.[10] The Board by a vote of 2-1-2 instead of following the former decisions in this case

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[10] The term of 2 members of the former majority of the Board had expired and they were not reappointed; and 2 new members were appointed, one becoming Chairman and both participated in this decision.

voted not to enforce the Decision of the Trial Examiner and, instead, dismissed the complaint.

The former 2 minority members who had dissented from the original decision on January 12, 1968 (members Fanning and Jenkins) now wrote an opinion again finding merit in the Employer's attack on the proceedings on the UC petition, and reaffirmed their dissenting view expressed in the initial decision "for the reasons fully set forth therein" and concluding that the Board was without statutory authority to direct and conduct the elections in that proceeding.

The sole remaining member of the former majority (Brown) adhered to the majority opinion in the underlying unit clarification case, that the elections were valid and the certified unit was properly clarified to include the Brackenridge and Lathrop employees and therefore the Employer violated the Act by refusing to bargain with the Union in the certified unit.

One of the newly appointed members expressed the view that the decisions and determinations of the Board with respect to unit clarification were, for the reasons set forth in the majority opinion in that proceeding, within the scope of the Board's authority and not an abuse of the Board's discretion; and therefore the Employer had violated the Act and he would affirm the Trial Examiner's decision.

The newly appointed Chairman agreed with the former majority on the two major issues: (1) that the statutory authority of the Board included the authority to merge separate units as had been done in this case; and (2) that the original majority was also right in holding that the statute does not prohibit the conduct of such elections; however, while voting with the former minority to dismiss

the unfair labor practice complaint, he expressly rejected the reasoning which led them to that conclusion—he relied upon the fact that the Board had refused since 1968 to follow and apply the UC decision against this Employer "even in cases which were virtually indistinguishable."[11]

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[11] He cited *PPG Industries, Inc.*, 180 NLRB, No. 58; and *Rohm & Haas Company*, 183 NLRB, No. 20. However, when the Board was deciding each of those cases a majority, consisting of the two former minority members plus one member of the old majority joining them, agreed that the doctrine of the UC decision did not apply to each of those cases because factually they were dissimilar, most particularly in that they did not deal with an employer-wide unit, but rather proposed units of part of an employer's plants in this industry; thus, of the 16 plants listed in fns. 5 and 6 and text in the *PPG Industries* decision (180 NLRB, No. 58), it is made clear that the Union was simply seeking to combine into one bargaining unit 4 separately represented plants with its existing 9-plant multiplant unit; of this Employer, out of a total of 16 plants in the industry operated by the Employer, and the petitioner did not represent the units at 4 other glass plants of the Employer, 2 of which were represented by other unions and 2 of which were unrepresented (fns. 13 to 15 and text thereto); the new 3-member majority in that opinion finding expressly that "the multiplant unit * * * sought is not one which the Board would find appropriate on any basis except agreement of the parties". With regard to the other decision cited by the new Chairman (*Rohm & Haas*, 183 NLRB, No. 20), again the unit sought by the Union was not employer-wide, even in its chemical division, but rather was an effort to have the Board combine into one bargaining unit 3 separate bargaining units of employees which it represents, although there is no established multiplant unit and the Union did not represent any employees at the 3 other chemical plants of this employer, some of whom are represented by other unions and some are not represented. The decision was by a 3-member panel consisting of Members Fanning and Jenkins, minority in the UC decisions in L-O-F, and one member from the majority in those cases who joined in voting to dismiss *Rohm & Haas* because he found that the multiplant unit sought over the Employer's objection would not be appropriate under the traditional standards applied by the Board.

The result of this split voting, based on the diversity of expressed reasons, was that there was no majority for any reason later held to be valid; whereas there were 3 votes in favor of the reasons expressed in both opinions in the UC proceedings supporting the position of the Union. Nevertheless, the Board by this 3-member vote dismissed the unfair labor practice charge which the Trial Examiner had sustained.

To review and reverse this odd result the Union appealed to Third Circuit Court of Appeals which heard oral argument and by opinion filed June 21, 1972, vacated the Board's order of dismissal entered April 16, 1971, and directed that the Board reconsider Case 6-CA-4771 in the light of that opinion. The Court gave as its reason that "the reconsideration of [the underlying UC] issue required a finding by at least a majority of the Board of the appropriateness of the units involved". The Court also disposed of 2 additional grounds raised by the Company and held that:

(1) "the Board acted within its statutory authority in conducting a UC proceeding designed to consider the merger of existing collective bargaining units;" and the Court added: "We assume that on remand, given its authority to combine existing units, the Board will consider the desirability of exercising this authority in light of its obligation to select units which will further the policies of the Act".

(2) that the Board had the requisite authority to conduct the election in the absence of a question of representation [In all the plants involved the units were represented by the same Union].

But the Court attached the condition that the Board must first find that two or more units are equally appropriate. The Court recognized that "in the underlying U.C.

procedure [the Board majority] first determined that both the single-plant Brackenridge unit and the employer-wide unit were presumptively appropriate and then ordered the election". However, by reconsidering in 189 NLRB No. 139 (Opinion of April 16, 1971) the U.C. order of 1968, the Board was obligated to express its opinion on the appropriateness of the unit, and a majority of the Board failed to do so. So the Court remanded the matter to the Board so it could rule (by a majority) on the appropriateness of the ten-plant unit.

The Board, by its new Supplemental Decision and Order of March 1, 1973, 202 NLRB No. 15 by a vote of 4-1 stated that:

> "For the reasons stated in the underlying unit clarification decision, we reaffirm the unit determination there made. In our opinion, the Board's finding in that case that the single-plant and multiplant units constituted equally appropriate units for bargaining was proper and correct".

By such back reference the Board incorporated as the basis for its determination all supporting statements in its earlier decisions.

Thus, it said in its initial decision of January 12, 1968, that "an employer-wide unit is * * * presumptively appropriate", citing *Owens-Illinois Glass Co.*, 136 NLRB 389, 392. From the direction of election in that decision Members Fanning and Jenkins dissented. However, these two Board Members joined two other Board Members, so that by a 4-1 vote the Board accepted the "reasons stated in the underlying unit clarification decision".

In between those two decisions, 3 years and 2 months apart, the Board on at least one other occasion made the same ruling; thus, in the Board's Supplemental Decision

and Order Clarifying Unit, dated December 10, 1968 the Board ruled "we find that the appropriate unit for future bargaining is the enlarged multiplant unit [including Lathrop and Brackenridge]."

The Company, however, on April 10, 1973, then filed a Motion for Reconsideration of Board's Supplemental Decision and Order of March 1, 1973, which the Board denied by its Order Denying Motion, dated May 18, 1973 in which the Board stated that in its Supplemental Decision and Order dated March 1, 1973, it had "reaffirmed the unit determination made in the underlying unit clarification decision" (169 NLRB 126 and 173 NLRB 1231).

The company then petitioned the Court of Appeals for review and the Board filed a cross-application for enforcement (with the United Glass Workers intervening). The Third Circuit (Rosenn, J. dissenting) denied the company's petition, holding that the Board's underlying unit determination was supported by substantial credible evidence, and was not arbitrary, discriminatory or inconsistent with Board policy applied in other cases.[12]

On June 13, 1974, the Third Circuit denied without opinion the company's Petition for Rehearing *in banc*.[13]

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[12] *Libbey-Owens-Ford Company* v. *NLRB, et al.*, 495 F2d 1195 (3 Cir. 1974).

[13] *Libbey-Owens-Ford Company* v. *NLRB, et al.*, see App. G of Petition.

ARGUMENT

The decision below, as acknowledged by the petitioner, is one which is unique in that it turns on its own facts and affects few other than the litigants. The Board has refused to conduct similar elections in other cases (See *Pittsburgh Plate Glass Industries*, 180 NLRB 477, 480-481 (1969) (Petition at p. 16)). However, as noted in fn. 11 of the counterstatement of the case *supra* the cases in which the Board has refused to conduct similar elections are easily distinguishable on their facts. The petitioner has not shown disparate treatment by the Board in identical, or even factually similar situations.

Further, the opinions of the Third Circuit and the Board should not be disturbed as it is clear that they are eminently correct and proper.

Congress, via the National Labor Relations Act as amended, bestowed upon employees the right to self-organize and bargain collectively "in respect to rates of pay, wages, hours of employment or other conditions of employment" through representatives of their own choosing. (Section 9(a)). Further, Section 9(b) of the Act directs the Board in each case to determine whether "in order to assure the employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, plant unit, or sub-division thereof." It is rudimentary that the determination of what constitutes an appropriate unit in each instance "involves of necessity a large measure of informed discretion, and *the decision of the Board, if not final, is rarely to be disturbed.*" (emphasis supplied). *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). See also *NLRB* v. *New Enterprise Stone & Lime Co.*, 413 F. 2d 117, 119 (3 Circ. 1969).

The Board has consistently held, in interpreting the above Sections of the Act, that an "employer unit" and a "plant unit" are presumptively appropriate. *Owens-Illinois Glass Co.*, 136 NLRB 389, 392 (1962). In *Western Electric Company, Inc.*, 98 NLRB 1018, 1032 (1952) the Board stated its view of the law as follows:

> "On its face, the unit requested is appropriate because it is co-extensive with the entire Company. A unit of such scope is the first one called appropriate in Section 9(b) of the Act, upon which the Board's authority to establish collective bargaining rests. Apart from situations controlled or affected by special statutory requirements, it is also the basic unit recognized by the Board since its earliest days. Indeed, it may be stated as a general rule that, absent any statutory considerations, the Board does not refuse to grant a company-wide unit to a labor organization unless it is affirmatively shown that a smaller one is more appropriate."

See also *Miratile Mfg. Co.*, 124 NLRB 48, 49-50 (1959) and *Beaumont Forging Co.*, 110 NLRB 2200-2201-2202 (1954).

In *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 156 (1941) the Court held that there may properly be considered a wide variety of factors, and due to the Board's vast discretion the presence or absence of one or even several of these factors is not necessarily controlling. The Court specifically stressed, amongst others, the wishes of the employees. This is especially significant in view of the wide margin by which the employees in the two plants in question (Brackenridge and Lathrop) voted in favor of joining the multi-plant unit.

As the Third Circuit Court of Appeals noted in its thorough opinion (495 F. 2d 1195, 1200; p. 64a of Petition), an appellate court is limited in its review of the Board's unit determinations. Such determinations "are binding upon reviewing courts if grounded in reasonableness." Reasonableness "necessarily implies that the Board has given due consideration to all relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict." *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422-423 (1947).

The Board found, in including the Brackenridge plant in the multi-plant unit that Brackenridge did not differ significantly from other plants in the multi-plant unit. The evidence was clear that the physical location of Brackenridge was not such as to justify deprivation of membership in the multi-plant as the multi-plant unit was not based on any geographical considerations. Second, in items of plant integration, the Board reasonably concluded (and the Court of Appeals concurred) that the two disputed plants possessed the same degree of functional or operational integrating or lack thereof as those already in the multi-plant unit.

The Company strongly contests the Board's finding of a similarity of operations between the multi-plant unit and the other plants in question, claiming that Brackenridge produces a unique type of product (fabricated filmed surface glass). The Third Circuit ruled that "the issue is not whether the skills involved at Brackenridge differ from those found elsewhere in the multi-plant unit, but whether such difference is greater than that found among the other plants." (495 F. 2d at 1201; p. 67a of Petition). Both the Board and the Court of Appeals properly found that those plants already in the multi-plant unit

included a wide variety of techniques and that the inclusion of Brackenridge would not introduce a significant new element of diversity.

As to petitioner's argument that the Board's unit determination in this case is arbitrary, discriminatory and inconsistent, the Court of Appeals responded as does respondent, *supra* at p. 13, fn. 11, that subsequent cases wherein the Board refused to order a new multi-plant unit where clearly factually distinguishable. Accordingly, *Rohm & Haas Co.*, 183 NLRB No. 20 (1970), *Cities Services Oil Co.*, 182 NLRB 12 (1970) and *PPG Industries, Inc.*, 180 NLRB 447 (1969) are all inapposite. Further the above-cited cases were not appealed, hence "the issue of appropriateness was not determined by a Board majority . . . and thus the difference in result between those cases and this is not attributable to a discriminatory application of Board policy." (495 F. 2d at 1202; p. 69a of Petition).

In its "Reasons for Granting the Writ" the petitioner makes the following statement:

> "Use of the unit clarification petition to consolidate pre-existing bargaining units in the absence of changed circumstances rendering the existing units inappropriate obviously erodes the stability of labor relations by inviting unions or employers hoping to improve their bargaining positions by seeking different groupings to upset long established and successful bargaining units." (Petition at 13-14)

However, the petitioner offers absolutely no evidence of any obvious erosion of the stability of labor relations. In fact the Court of Appeals totally rejected this argument below when it said that "the Board correctly finds that a sufficient community of interest exists among the workers

in the proposed unit to ensure that such unit will be viable for bargaining purposes. The fact that inclusion in the multi-plant unit may increase the bargaining power of the Brackenridge employees should not serve as a basis for exclusion." (495 F. 2d at 1203; p. 69a of Petition).

All of this must be viewed against the backdrop of the overwhelming majority of Brackenridge employees who desire to join the multi-plant unit. Accordingly, the citation from Abudeely, *The NLRB and the Unit Clarification Petition*, 117 U. Pa. L. Rev. 1075, 1098 (1969), quoted by petitioner at p. 17 of the Petition is inapposite. Petitioner states that use of the unit classification procedure to consolidate admittedly appropriate units denies employees their right to choose their representatives and unfairly favors the incumbent union over others. The record here clearly shows that the Brackenridge employees had ample opportunity to choose their representatives. Further they had the opportunity to determine whether they wanted to be in a plant unit or in a multi-plant unit. They overwhelmingly chose the latter. It is inconsistent for petitioner to argue that the Brackenridge employees are being deprived of the right to choose their representatives when it is petitioner who seeks to ignore the result evidenced when they exercised their free choice. Further, as the Court of Appeals noted, there is absolutely no proof that the merger of the two pre-existing units "will inevitably have a significant negative effect upon stability in labor relations". In fact, the record in this case indicates the contrary as the Lathrop plant has been successfully integrated into the multi-plant unit.

> "(T)here is no evidence to suggest that that merger had any adverse impact on the labor relations or operations of either the Lathrop plant or any of the other plants within the multi-plant unit." (495 F. 2d at 1203; p. 70a of the Petition).

CONCLUSION

For the reasons set forth, the petition for certiorari should be denied.

Respectfully submitted,

EMIL OXFELD,
Attorney for Respondent United Glass and Ceramic Workers of North America.

SANFORD R. OXFELD,
On the Brief.

V

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-263

LIBBEY-OWENS-FORD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 57a-81a) is reported at 495 F. 2d 1195; its earlier opinion (Pet. App. 30a-42a) is reported at 463 F. 2d 31. The Board's original decision and order (Pet. App. 22a-29a) are reported at 189 NLRB 871; the related representation case decision (Pet. App. 1a-22a) is reported at 169 NLRB 126. The Board's supplemental decision and order (Pet. App. 43a-55a) are reported at 202 NLRB 29.

JURISDICTION

The order of the court of appeals denying rehearing and rehearing *en banc* was entered on June 13, 1974 (Pet. App. 82a-83a). The petition for a writ

of certiorari was filed on September 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly combined for collective bargaining purposes an existing multi-plant unit and an existing single plant unit of the company's employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 5 of the petition.

STATEMENT

A. Background

The Company manufactures and sells glass and glass products (A. 42a).[1] On January 30, 1939, the Board certified the Union[2] as the collective bargaining representative of a unit consisting of the Company's production and maintenance employees at eight plants located in various parts of the country (A. 4a-5a, 127a-129a). The Company and Union have maintained a continuing bargaining relationship in that unit since the certification (A. 66a, 130a-132a). The Company also has recognized the Union as the bargaining representative for similar employees at two other plants. Each of these additional plants was, however, recognized as a separate unit and each had a separate

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[1]"A." refers to the appendix to the briefs in the court below.

[2]United Glass and Ceramic Workers of North America, AFL-CIO-CLC.

collective bargaining agreement (A. 43a-44a, 6a). The Company accorded recognition at one plant, located in Brackenridge, Pennsylvania, in 1943, after it had been acquired by purchase; recognition was accorded at the second plant, located in Lathrop, California, in 1962, shortly after the Company constructed it (A. 6a-7a).

On July 13, 1966, the Union filed a petition with the Board seeking to clarify the existing multi-plant unit by including the represented employees in the single plant units at Brackenridge and Lathrop (A. 87a). Following a hearing, the Board directed separate elections at the Lathrop and Brackenridge plants to determine whether the employees desired to be included in the larger multi-plant unit. The Board concluded that, since the existing separate units or multi-plant unit were equally appropriate, the unit placement of the disputed employees should be determined by a majority vote of the employees in the affected single-plant units (Pet. App. 8a-13a). Members Fanning and Jenkins dissented from the decision because, in their view, the Board lacked authority under the Act for holding an election to determine the unit placement of represented employees (Pet. App. 15a-19a).[3]

At the elections held among the employees of the Brackenridge and Lathrop plants, a majority of the employees in each unit voted in favor of being represented in the multi-plant unit. On December 10, 1968, the

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[3]The Company sought to enjoin the elections by filing suit in the United States District Court for the District of Columbia. The district court granted the injunction but that decision was reversed by the court of appeals for lack of jurisdiction over the subject matter. *McCulloch* v. *Libbey-Owens-Ford Glass Co.*, 403 F. 2d 916 (C.A. D.C.), certiorari denied, 393 U.S. 1016.

Board, with Members Fanning and Jenkins again dissenting, overruled the Company objections to the election, and ordered that the existing multi-plant unit be clarified to include the production and maintenance employees at the Lathrop and Brackenridge plants (Pet. App. 19a-22a).

When the Company subsequently refused to include the Brackenridge employees in the multi-plant unit, the Union filed an unfair labor practice charge against the Company alleging that its refusal was contrary to the Board's unit-clarification decision (A. 88a, 41a). The Board dismissed the complaint. Members Fanning and Jenkins based their decision on their previously stated view that the Board lacked statutory authority to determine the unit placement of represented employees by conducting elections to clarify existing bargaining units (Pet. App. 22a-25a). Chairman Miller concurred in the dismissal because, in his view, the Board's "duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties" (Pet. App. 26a-28a). Members Brown and Kennedy, in separate dissents, concluded that the underlying certification was a proper exercise of the Board's authority, that the Company was under a duty to honor that certification, and that its failure to do so constituted a violation of its bargaining obligation (Pet. App. 28a-29a).

On review, the court of appeals held that the unit clarification procedure was an appropriate mechanism for consolidating existing appropriate bargaining units, and that the Board possessed statutory authority to conduct the clarification elections at the Brackenridge and Lathrop plants. The court found, however, that because of their respective views of the case, neither Members

Fanning and Jenkins nor Chairman Miller had passed on the appropriateness of the multi-plant unit. Accordingly, the court remanded the case to the Board to make such a determination, unless it decided not to proceed with the case for policy reasons.

B. The Instant Board and Court Decisions

On remand, the Board concluded that the Company, by refusing to bargain with the Union on behalf of its Brackenridge employees as part of the clarified multi-plant unit, violated Section 8(a)(5) and (1) of the Act (Pet. App. 49a). The Board ordered the Company to bargain with the Union upon request in such a multi-plant unit (Pet. App. 50a-51a).

The court of appeals (with Judge Rosenn dissenting) enforced the Board's order. The court held that the Board's finding that a multi-plant bargaining unit which included the Brackenridge plant was appropriate was supported by substantial evidence. The court also held that the Board's unit determination was not arbitrary or capricious. (Pet. App. 56a-81a.)

ARGUMENT

The Board's finding that an existing multi-plant unit could properly be combined with two existing single-plant units, for collective bargaining purposes, turns on the facts of this particular case and constitutes a reasonable exercise of the broad discretion accorded the Board in fixing appropriate units. Thus, no issue warranting review is presented.[4]

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[4]The question whether the Board has statutory authority to hold an election for the purpose of determining whether employees already represented by a union in one unit desire to be included

Section 9(b) of the Act directs the Board in each case to determine whether "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." As this Court observed in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491, the determination of an appropriate unit "involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422-423.

The court of appeals correctly concluded that the Board's unit determination in this case was reasonable. "[F]irst, * * * the history of bargaining between the Company and the Union demonstrates a pattern of successful bargaining in a unit of widely scattered plants which are not functionally or operationally integrated, and, second, * * * the Brackenridge and Lathrop plants do not differ significantly from those plants which, over the years, have been successfully integrated into a single, multi-

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in a larger unit represented by that union is not properly presented here. The court below, in its original decision, held that the Board has such authority (Pet. App. 36a-40a) (see also *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 267-268). The Company did not seek review of that decision; the only issue which it raised in the second proceeding below was "whether the Board's underlying unit determination was erroneous" (Pet. App. 62a).

plant unit" (Pet. App. 64a).[5] In addition, the employees at the separate plants expressed a preference to be included in the multi-plant unit.

Petitioner contends (Pet. 12) that the policies of the Act are impaired by permitting the Board to consolidate "preexisting bargaining units in the absence of mutual consent and without any finding that the existing units have become inappropriate due to changed circumstances, or that consolidation will improve labor relations." Contrary to petitioner's assertion (Pet. 13), however, the consolidation of the existing units here did not erode "the stability of labor relations." As the court below noted (Pet. App. 64a), "for the past 40 years the Company and the Union have been bargaining on a multi-plant basis, and during that period the unit has been enlarged as the Company has acquired new plants." While "there is also a history of successful bargaining between the Company and the Union in the single-plant unit at Brackenridge," that "fact alone does not conflict with the Board's finding that the inclusion of Brackenridge in the multi-plant unit would also be appropriate, for there is no reason to infer that a history of successful bargaining within a single-plant unit would interfere with successful bargaining by the same parties on a broader basis" (Pet. App. 65a).[6]

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[5]Insofar as petitioner contends that conditions at the Brackenridge plant substantially differed from those of the others plants (Pet. 15), the court of appeals found (Pet. App. 66a-67a) that substantial evidence supported the Board's finding to the contrary. That issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

[6]*Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705, relied upon by petitioner (Pet. 15), is inapposite. That case involved the propriety of a Board bargaining order issued to remedy an unlawful refusal to bargain which had the effect of dissipating the union's original majority.

Nor has the Board abdicated "its responsibility to determine whether the consolidated unit is 'appropriate' by relying on the ostensible desires of the Brackenridge employees," as petitioner contends (Pet. 16). As the court below concluded, in its original decision, the Board properly elicited the views of the employees in aid of its responsibilities under Section 9(b) of the Act to fix units to insure employees the "fullest freedom" in exercising statutory rights (Pet. App. 40a). Employee views are highly relevant to unit determinations. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 156. In analogous situations, the Board has long utilized its election processes to afford craft employees the opportunity to choose whether they wished to be represented separately or included in a larger unit. See *Globe Machine and Stamping Co.,* 3 NLRB 294; *National Labor Relations Board* v. *Underwood Machinery Co.,* 179 F. 2d 118 (C.A. 1); *National Labor Relations Board* v. *Weyerhaeuser Co.,* 276 F. 2d 865, 872 (C.A. 7). In short, where, as here, the Board finds two or more units to be equally appropriate, it may properly exercise its duty to determine the appropriate unit "by conducting an election to determine employees' preference" (Pet. App. 40a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1974.